

COMMENTS

NATIONAL SECURITY AND THE VICTIMS OF IMMIGRATION LAW: CRIMES OF VIOLENCE AFTER *LEOCAL v. ASHCROFT*

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I. INTRODUCTION

Mary Anne Gehris describes herself as a victim of United States immigration law.¹ She was born in Germany in 1965 and moved to the United States with her adoptive parents when she was less than two years old.² A lawful permanent resident³ for

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1. Am. Immig. Laws. Assn., *Statement of Mary Anne Gehris on Conyers Bill, H.R. 4966*, <http://www.aila.org/contentViewer.aspx?bc=10,911,1002,1008,1029&st=Gehris> (accessed Mar. 6, 2005).

2. 146 Cong. Rec. S9387 (daily ed. Sept. 27, 2000).

3. The Immigration and Nationality Act makes a distinction between inadmissible aliens—those who have not been legally admitted to the United States by going through inspection—and deportable aliens—those who were admitted through the proper inspections process but are deportable for a violation of immigration laws. Compare Immig. & Nationality Act § 1212 (INA), 8 U.S.C. § 1182 (2000) (addressing inadmissibility), with INA § 237, 8 U.S.C. § 1227 (2000) (addressing removability). Admitted aliens are those who have achieved “lawful entry . . . into the United States after inspection and authorization by an immigration officer.” INA § 101(a)(13)(A), 8 U.S.C. § 1101 (2000); see also *In re S-*, 19 I. & N. Dec. 851, 853 (Comm. 1988) (explaining that lawful admission into the United States involves being “admitted ‘in accordance with the immigration laws’” (quoting INA § 101(a)(20))). The term “aggravated felony” is found in INA § 237(a)(2)(A)(iii) and establishes grounds for deportation, now known as removal, not inadmissibility. INA

nearly forty years, Ms. Gehris is married and has two children, one of whom suffers from cerebral palsy.⁴ In 1988, Ms. Gehris pulled another woman's hair.⁵ She pled guilty to the charge of misdemeanor assault, following the advice of her public defender.⁶ In 1999, Ms. Gehris applied for United States citizenship.⁷ In response to her application, the Immigration and Naturalization Service (INS)⁸ served Ms. Gehris with a notice to appear (NTA),⁹ charging her as a deportable, or what would now be called a removable, alien.¹⁰ INS told Ms. Gehris that her prior misdemeanor conviction was a "crime of violence,"¹¹ a deportable offense under the Immigration and Nationality Act (INA),¹² as amended in 1996. Unlike most immigrants in her position,¹³ however, Ms.

§ 237(a)(2)(A)(iii) (stating that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable"). Removal based on aggravated felonies affects only those aliens who have been *legally* admitted into the United States. *Id.*

4. 146 Cong. Rec. at S9387.

5. *Id.*

6. *Id.*; see also Am. Immig. Laws. Assn., *supra* n. 1 (describing Mary Anne Gehris's crime).

7. ABA Commn. on Immig., *American Justice through Immigrant's Eyes* ch. 3, 24, http://www.abanet.org/publicserv/immigration/Due_Process.html (accessed Mar. 6, 2005).

8. As the District of New Jersey recently explained, the functions of INS have now been taken over by the Bureau of Immigration and Customs Enforcement:

Effective March 1, 2003, the INS ceased to exist as an agency of the Department of Justice, and its functions were transferred to the DHS. See Homeland Sec. Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). The Bureau of Immigration and Customs Enforcement ("ICE") of the DHS is responsible for the interior investigation and enforcement functions that formerly were performed by the INS.

Ararat v. Dept. of Homeland Sec., 2005 WL 2130094, at *1, n. 1 (D.N.J. Aug. 30, 2005). Also, on February 3, 2005, Alberto R. Gonzalez replaced John Ashcroft as the Attorney General of the United States and head of the Department of Justice. See *United States Department of Justice*, <http://www.usdoj.gov/ag/aggonzalesbio.html> (accessed Oct. 6, 2005).

9. A notice to appear (NTA) is the official charging document within immigration law. It indicates that the alien has been accused of violating United States immigration law and summons the alien to appear before an immigration judge.

10. ABA Commn. on Immig., *supra* n. 7.

11. *Id.*

12. INA § 237(a)(2)(A)(iii). There are many harsh consequences flowing from an aggravated felony conviction. For example, an alien who has been ordered removed as an aggravated felon can never be readmitted to the United States. INA § 212(9)(A)(i). In addition, aggravated felons are ineligible for relief from deportation through cancellation of removal, INA § 240A(a)(3); asylum, INA § 208(b)(2)(A)(1)(ii); withholding of removal, INA § 241(b)(3)(B); voluntary departure, INA § 240B(a)-(b); or a 212(c) waiver. *In re Cazares-Alvarez*, 21 I. & N. Dec. 188, 201 (BIA 1997) (holding that a § 212(c) waiver is not available to aliens whose cases were pending on or after April 24, 1996, the date § 212(c) was repealed). Aggravated felons are also subject to mandatory detention. INA § 236(c).

13. *E.g.* 146 Cong. Rec. at S9387 (discussing the deportation of Ana Flores).

Gehris was allowed to stay in the United States after the Georgia Board of Pardons issued a pardon for her conviction, noting that the 1996 immigration laws had “adversely affected the lives of numerous Georgia residents.”¹⁴

Although Ms. Gehris’s removal order and others like it¹⁵ have provoked criticism that United States immigration laws are unfair or harsh,¹⁶ removal orders based on minor offenses are largely the result of the systematic expansion of crime-related removal over the past decade.¹⁷ The expanded scope of crime-related removal is directly related to the increasingly important role immigration law has played in the national security of the United States.¹⁸ The passage of the Antiterrorism and Effective Death Penalty Act (AEDPA)¹⁹ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)²⁰ in 1996 solidified the congressional policy of using strict crime-related removal laws to

14. *Id.* (state. of Sen. Edward Kennedy).

15. *Id.* Ana Flores, who complained to police several times of being physically abused by her husband, was placed on probation for six months after she pled guilty to biting her husband in a domestic dispute. *Id.* She has been ordered deported to Guatemala, although she has two United States citizen children. *Id.*

16. Lupe S. Salinas, *Deportation, Removals, and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. Intl. L.J. 245, 257 (2004) (stating that “[t]he description of an aggravated felony in the 1996 Immigration Acts qualifies state crimes, including misdemeanors punishable by one year, for deportation,” and quoting a student writer’s comment that the 1996 laws are “not only cruel, but also wildly inconsistent, meting out the same punishment to lawful permanent residents who commit a misdemeanor offense as they do to undocumented non-citizens who enter the country to commit a terrorist act”) (quoting Melissa Cook, Student Author, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act As a Human Rights Violation*, 23 B.C. Third World L.J. 293, 327–328 (2003)).

17. *E.g.* 146 Cong. Rec. at S9388 (state. of Sen. Patrick Leahy) (commenting that “[w]ith [the 1996] laws, we turned our back on our historical commitment to immigration and the rule of law” and admonishing that “[i]t is long past time to undo the damage that was done then”).

18. For a discussion of the relationship between terrorism and immigration law, see Salinas, *supra* note 16, at 275 (stating that “[u]nfortunately, the terrorist attacks on the World Trade Center and Pentagon drove several public officials to support measures that restrict the civil liberties of not only Americans but also resident and other aliens in this country”); see also H.R. Subcomm. on Immig. & Claims of the Jud. Comm., *Terrorist Threats to the United States*, 106th Cong. 37 (Jan. 25, 2000) (statement of Steven Emerson) (commenting that “the list of terrorists and militants allowed to enter the United States or granted green cards or citizenship is nothing less than staggering”).

19. Pub. L. No. 104-132, 110 Stat. 1214 (1996). For an excellent discussion of the relationship between immigration law and AEDPA, see Alison Holland, *Across the Border and over the Line: Congress’s Attack on Criminal Aliens and the Judiciary under the Antiterrorism and Effective Death Penalty Act of 1996*, 27 Am. J. Crim. L. 385 (2000).

20. Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 (1996).

supplement national security measures targeting terrorism. The connection between crime-related removal and national security is now further embodied in the USA PATRIOT Act,²¹ which has expanded terrorism-related grounds for deportation.²²

The congressional policy of expanding crime-related removal in response to national security concerns has led to the enactment of unproductive laws that target the wrong people and waste precious judicial resources.²³ President Clinton observed in 1996, as he signed IIRIRA, "This bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism. These provisions eliminate most remedial relief for long-term legal residents."²⁴ While the Department of Homeland Security (DHS), the Bureau of Immigration and Customs Enforcement (ICE), and immigration judges invest time in the removal proceedings of lawful permanent residents like Ms. Gehris,²⁵ thousands of illegal aliens from many countries stream across the United States border daily, completely undocumented and uninspected.²⁶ Aliens like Ms. Gehris, who have been convicted of an "aggravated felony" and are therefore automatically subject to mandatory detention, are confined in detention centers, while other potentially dangerous illegal aliens are turned away

21. Pub. L. No. 107-56, 115 Stat. 272 (2001).

22. *Id.* at §§ 411–412.

23. H.R. Subcomm. on Immig. & Claims of the Jud. Comm., *Hearing on INS's March 2002 Notification of Approval of Change of Status for Pilot Training for Terrorist Hijackers Mohammed Atta and Marwan Al-Shehhi*, 107th Cong. 11 (Mar. 19, 2002) (state. of Rep. John Conyers, Jr.) (stating that while the INS "remains fixated on detaining and rounding up countless thousands of Arab-Americans and permanent residents without any known justification, [it] . . . has failed to take the most basic steps to ensure that visa approvals are not issued to known terrorists").

24. Salinas, *supra* n. 16, at 250 (quoting President William Jefferson Clinton).

25. According to the Center for Immigration Studies, the "net fiscal cost of immigration ranges from \$11 billion to \$22 billion per year, with most government expenditures on immigrants coming from state and local coffers, while most taxes paid by immigrants go to the federal treasury." Ctr. for Immig. Stud., *Costs*, <http://www.cis.org/topics/costs.html> (accessed May 10, 2005).

26. Jeff Stoffer, *Forgiven Trespasses: Illegal Aliens from around the World Expose America's Vulnerabilities*, *Am. Legion Mag.* 19 (Aug. 2004) (observing that because "[e]nough illegal traffic pours through the desert every day, Border Patrol agents could make as many apprehensions as desired," but noting that "logistically, [Border Patrol] can't deal with it" (quoting Michael King, Vice President of Technology for Border Technologies, Inc.)). In support of his observations, Stoffer states that "[i]n the first three months of 2004, in the Tucson Border Patrol sector alone, more than 200,000 illegal aliens were apprehended." *Id.* at 16. Stoffer believes that "three illegals get by for each one caught and sent back." *Id.* at 15.

from detention centers for lack of space.²⁷ Detainment and removal of criminals like Ms. Gehris is simply not a pressing issue of national security.²⁸

One example of the congressional expansion of crime-related deportation is the decision to define “aggravated felony” in INA § 101(a)(43)(F) as a “crime of violence” for which the term of imprisonment exceeds one year.²⁹ As illustrated in the case of Mary Anne Gehris,³⁰ under the crime of violence definition currently in force,³¹ a lawful permanent resident who has lived in the United States for over two decades can be deported for pulling another person’s hair.³² One reason that the crime of violence provision has encouraged deportations based on minor crimes is that the crime of violence definition fails to recognize an important aspect of criminal culpability—*mens rea*.³³

Criminal culpability generally consists of two components, a blameworthy act and a wrongful mental state, or *mens rea*.³⁴ From a policy perspective, these components reflect “an expression of the community’s moral outrage” for acts that constitute a breach of an individual’s public duties owed to society as a whole.³⁵ Crime-related removal proceedings, on the other hand,

27. Kevin Johnson, *Immigrant ‘Capture and Release’ Concerns Officials*, USA Today 12A (July 16, 2004) (stating that on “[t]he same day Homeland Security Secretary Tom Ridge issued an ominous warning about terrorists aiming to disrupt the U.S. election process, federal immigration authorities approved the release of more than 30 illegal South and Central American immigrants captured at a West Texas truck stop”). Johnson comments that “limited detention space—9,444 beds—represents a ‘challenge’ to federal immigration authorities.” *Id.* Johnson further notes that more than seventy percent of the illegal immigrants released on bond fail to appear for their deportation hearings. *Id.*

28. See *infra* pts. II–III (discussing the relationship between national security and crime-related deportation).

29. For an excellent discussion of how Congress has consistently expanded the definition of crimes of violence, see *U.S. v. Johnson*, 704 F. Supp. 1398, 1400 (E.D. Mich. 1988) (stating that “[i]n moving to provide a uniform definition of ‘crimes of violence,’ Congress concurrently jettisoned a more limited conception of ‘crimes of violence’ previously included in Title 18,” and recognizing that the current definition is “more nebulous and seemingly more expansive”).

30. *Supra* nn. 1–14 and accompanying text (discussing the deportation proceedings of Mary Anne Gehris).

31. INA § 101(a)(43)(F); 18 U.S.C. § 16 (2000).

32. *Supra* nn. 1–14 and accompanying text.

33. *Infra* nn. 189–210 and accompanying text (discussing the impact of the absence of a mental requirement in 18 U.S.C. § 16). For a discussion of the mental requirements in criminal law, see Part VI, *infra*.

34. Joshua Dressler, *Understanding Criminal Law* § 1.01 (3d ed., Lexis 2001).

35. *Id.*

are in place to identify dangerous aliens living inside the borders of the United States who pose a significant threat to national security and thus must be removed.³⁶ The different policies underlying these two areas of law conflict when criminal culpability forms a basis for “liability” in the civil proceeding of deportation,³⁷ and as a result, immigration law does not always recognize the impact of these important criminal culpability components. For example, the crime of violence definition contained in 18 U.S.C. § 16 includes felony offenses that involve “a substantial risk of force against another’s person or property.”³⁸ Although this definition refers to criminal offenses, the crime of violence provision in 18 U.S.C. § 16 makes no reference to an important aspect of criminal culpability: *mens rea*. By failing to include a mental requirement in 18 U.S.C. § 16, Congress has essentially forced the judiciary to determine, as a matter of policy, which offenses and corresponding mental requirements present such a significant danger to American society as to warrant deportation.

The United States Supreme Court recently confronted precisely this issue in *Leocal v. Ashcroft*.³⁹ Read broadly, *Leocal* suggests that a crime that satisfies the statutory requirements of 18 U.S.C. § 16, but has a mental requirement of strict liability or negligence, is not an offense dangerous enough to warrant deportation.⁴⁰ More specifically, *Leocal* resolved a circuit split by hold-

36. *E.g. Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (quoting the Government’s argument that the policies underlying post-removal detention of criminal aliens include “ensuring the appearance of aliens at future immigration proceedings” and “[p]reventing danger to the community”).

37. Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. Intl. L. Rev. 29, 47 (2003) (stating that “[e]ven though the criminal proceeding is conducted separately from the removal proceeding, the two have become increasingly intertwined” and commenting that “[t]he conviction and the actual crime committed play a role in the removal proceeding since it is one of the many ways an alien becomes deportable”).

38. The definition of “crime of violence” found in 18 U.S.C. § 16 is also referenced in the following statutes: 18 U.S.C. § 3181 (2000); 18 U.S.C. § 3663A (2000); 20 U.S.C. § 6736 (2000); 21 U.S.C. § 841 (2000); 22 U.S.C. § 2728 (2000); 40 U.S.C. § 212(a) (2000); 40 U.S.C. § 212(a)(3) (2000); 42 U.S.C. § 1437(f) (2000); 42 U.S.C. § 13981 (2000); 42 U.S.C. § 14503 (2000).

39. 125 S. Ct. 377, 380 (2004) (granting certiorari “to resolve a conflict among the Courts of Appeals on the question whether state DUI offenses similar to the one in Florida, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence”).

40. *Id.* at 383 (reasoning that “while § 16(b) is broader than § 16(a) in the sense that physical force need not actually be applied, it contains the same formulation we found to

ing that driving under the influence, an offense that generally has a *mens rea* of strict liability or negligence, is not a crime of violence.⁴¹

Some courts have further suggested that an offense with a *mens rea* of recklessness should not be classified as a crime of violence.⁴² This has created inconsistency among the crimes that have become deportable offenses, resulting in drastic consequences for deported aliens.⁴³ For example, an alien convicted of

be determinative in § 16(a): the use of physical force against the person or property of another” and finding that “we must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense”).

41. *Id.* at 380 (resolving the split in authority among the federal circuit courts described in note 39, *infra*).

42. Compare *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) (holding that involuntary manslaughter is not a crime of violence and finding that “an unintentional accident caused by recklessness cannot properly be said to involve a substantial risk that a defendant will use physical force”); *In re Vargas-Sarmiento*, 23 I. & N. Dec. 651, 653 (BIA 2004) (making the comparison that “[u]nlike the second-degree manslaughter statute addressed in *Jobson*, which contains a *mens rea* element of recklessness, subsections 1 and 2 of section 125.20 [of the New York Penal Code] require proof of intent to cause either serious physical injury or death in order to secure a conviction for manslaughter in the first degree”); *U.S. v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992) (discussing the Sentencing Guidelines definition of crimes of violence, expressing concern that “a defendant could be deemed a career violent offender on the basis of two such convictions, even when he or she never intended harm, nor was there a substantial risk that he or she would have to use intentional force” and urging that “the Commission reconsider its career offender Guidelines to the extent that they cover such ‘pure recklessness’ crimes”) with *In re Alcantar*, 20 I. & N. Dec. 801, 813 (BIA 1994) (holding that a *mens rea* of recklessness is minimally sufficient to constitute a crime of violence); see also *Bazan-Reyes v. I.N.S.*, 256 F.3d 600, 612 (7th Cir. 2001) (holding that drunk driving is not a crime of violence). In *Bazan-Reyes*, the Seventh Circuit limited its interpretation of 18 U.S.C. § 16(b) to crimes “in which the offender is reckless with respect to the risk that intentional physical force will be used in the course of committing the offense.” *Id.* at 612. However, the court also suggested that the recklessness must relate to a specific intent crime. *Id.* at 611 (reasoning that burglary is a crime of violence because “[a] burglar has a *mens rea* legally nearly as bad as a specific intent to use force, for he or she recklessly risks having to commit a specific intent crime”).

43. An alien’s commission of a crime affects his or her legal status in the United States in several ways. An aggravated felony is a deportable offense under INA § 101(a)(43)(A)–(U), which includes twenty-three categories of offenses. An alien can also be deported or excluded for committing a “crime involving moral turpitude.” INA § 212(a)(2)(A)(i); INA § 237(a)(2)(A)(i)(I) (stating that an alien is deportable if he or she has committed a crime of moral turpitude within five years of the date of admission, or ten years for a lawful permanent resident); INA § 237(a)(2)(A)(ii) (stating that an alien can be deported for committing two or more crimes involving moral turpitude arising out of a single scheme of criminal conduct); see also *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (stating that “moral turpitude refers generally to conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general”). There are also certain provisions for deportation based on violations of the

involuntary manslaughter in California would be subject to deportation, whereas an alien convicted of the same offense in New York would not.⁴⁴ This Comment argues that the Supreme Court should take its ruling in *Leocal* one step further and hold that involuntary manslaughter, a crime with a *mens rea* of recklessness, is not a crime of violence.⁴⁵ In doing so, the Supreme Court would follow current judicial practice⁴⁶ and would ensure that only aliens who commit the most dangerous crimes involving violence are deported.

Part II of this Comment evaluates the historical forces that have led to the creation of the current definition of 18 U.S.C.

Controlled Substances Act. INA § 237(a)(2)(B)(i). A crime involving domestic violence is also a deportable offense. INA § 237(a)(2)(E).

44. Compare *Jobson*, 326 F.3d at 376 (holding that second-degree manslaughter under New York Penal Code is not a crime of violence) with *Park v. I.N.S.*, 252 F.3d 1018, 1022 (9th Cir. 2003) (holding that involuntary manslaughter in California is a crime of violence).

45. In *In re Rodolfo Bejarano-Urrutia*, the BIA held that involuntary manslaughter pursuant to Va. Code Ann. § 18.2-36—with a *mens rea* of “reckless or indifferent disregard of the rights of others”—was a crime of violence and rejected *Jobson* as “contrary to our established precedent.” 2005 WL 2418583 at **3-4 (BIA Oct. 1, 2004). Recently, the Fourth Circuit reversed the BIA’s holding in *Bejarano-Urrutia* based on *Leocal*. See *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 447 (4th Cir. 2005). The Fourth Circuit reasoned that “the conclusion of the *Leocal* Court that ‘[i]n no “ordinary or natural” sense can it be said that a person risks having to ‘use’ physical force against another person in the course of operating a vehicle while intoxicated and causing injury,’ . . . strongly indicates that the result in *Leocal* would have been the same even had a violation of the statute there at issue required recklessness rather than mere negligence.” *Id.* at 447. *Bejarano-Urrutia* illustrates the tension between the BIA’s interpretation of *Leocal* as being restricted to crimes with a *mens rea* of negligence and the Fourth and Third Circuit’s interpretations of *Leocal* as extending to crimes involving a *mens rea* of recklessness. 413 F.3d at 446. The BIA continues to rely on *Alcantar* and *Park* for the proposition that reckless conduct can be a crime of violence. See *In re Garcia*, 2005 WL 952439 at *3 (BIA Apr. 12, 2005) (determining that second degree assault under New York Penal Law § 120.05(4) with a *mens rea* of recklessness is a crime of violence because “[t]he *mens rea* here is greater than the ‘accidental or negligent conduct’ involved in a DUI offense case such as *Leocal*. . . also, the actual use of a dangerous weapon distinguishes it from simple assault cases which happen to result in injury”). The Third and Fourth Circuits, however, read *Leocal* to stand for the proposition that reckless conduct cannot be a crime of violence. See *Bejarano-Urrutia*, 413 F.3d at 446; *Oyebanji v. Gonzales*, 418 F.3d 260, 264 (3d Cir. 2005) (determining that involuntary manslaughter is not a crime of violence and explaining that “[p]articularly because the issue of the application of 18 U.S.C. § 16 to crimes of recklessness was on the Court’s mind, . . . , we cannot overlook the Court’s repeated statement that ‘accidental’ conduct (which would seem to include reckless conduct) is not enough to qualify as a crime of violence”).

46. *E.g. Parson*, 955 F.2d at 866 (stating that “[u]se of physical force is an intentional act, and therefore the first prong of both definitions [in 18 U.S.C. § 16] requires specific intent to use force”).

§ 16.⁴⁷ Part III examines the link between immigration law and national security in an attempt to explain why minor crimes have become deportable offenses.⁴⁸ Part IV discusses recent developments in defining crimes of violence and immigration reform, including the Supreme Court's recent decision in *Leocal*.⁴⁹ Part V examines the categorical approach to classifying crimes of violence, as well as other sources of ambiguity that have influenced judicial analysis of 18 U.S.C. § 16.⁵⁰ Part VI discusses the importance of *mens rea* requirements in criminal law and outlines the advantages of limiting the definition of crimes of violence to offenses with a *mens rea* requirement greater than recklessness.⁵¹ Part VII discusses how such a definition could be employed in the context of convictions for involuntary manslaughter.⁵² This Comment concludes by evaluating the limitations of the proposed interpretation of 18 U.S.C. § 16.⁵³

II. THE LEGISLATIVE HISTORY OF CRIMES OF VIOLENCE IN IMMIGRATION LAW

Crimes of violence encompass only one type of an entire category of deportable offenses known as "aggravated felonies."⁵⁴ Because the history of the crime of violence provision stems from the

47. *Infra* pt. II.

48. *Infra* pt. III.

49. 125 S. Ct. at 379; *infra* pt. IV.

50. *Infra* pt. IV; see Julie Anne Rah, Student Author, *The Removal of Aliens Who Drink and Drive: Felony DWI as a Crime of Violence under 18 U.S.C. § 16(b)*, 70 Fordham L. Rev. 2109, 2122–2124 (2002) (discussing how the categorical approach precludes a court from examining the particular facts of an alien's conviction); see also Timothy M. Mulvaney, *Categorical Approach or Categorical Chaos? A Critical Analysis of Inconsistencies in Determining Whether Felony DWI Is a Crime of Violence for Purposes of Deportation under 18 U.S.C. § 16*, 48 Vill. L. Rev. 697, 702 (2003) (recognizing that "[a]ll circuits that have addressed the question of whether felony DWI is a crime of violence have adopted this categorical approach, but implementing this approach has resulted in vastly different conclusions for noncitizens in deportation cases").

Using the categorical approach, courts determine whether an alien has committed a crime of violence by looking at the language of the criminal statute under which the alien was convicted rather than the alien's actual criminal conduct. *E.g. Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (discussing how the categorical approach, founded on the "intrinsic nature of the offense rather than on the factual circumstances surrounding any particular violation," emanates from the language of the statute).

51. *Infra* pt. VI.

52. *Infra* pt. VII.

53. *Infra* pt. VIII.

54. INA § 101(a)(43)(A)–(U).

inclusion of aggravated felonies in the INA,⁵⁵ it is important to discuss the history of both provisions.

A. Aggravated Felonies under the INA

Under current immigration law, aliens who have been lawfully admitted into the United States may be deported if they commit a crime that constitutes an aggravated felony.⁵⁶ The definition of “aggravated felony” in INA § 101(a)(43) encompasses twenty-three categories of offenses, including murder, rape, sexual abuse of a minor, burglary, theft, illicit trafficking in a controlled substance, child pornography, gambling, prostitution, crimes involving fraud or deceit where the loss to the victim exceeds \$10,000, tax evasion, alien smuggling, obstruction of justice, perjury, commercial bribery, counterfeiting, and crimes of violence.⁵⁷ While there are currently twenty-three ways to commit an aggravated felony, the definition of aggravated felony has not always been so expansive. In fact, the term “aggravated felony,” when it was first introduced to the INA, included only four offenses.⁵⁸

In 1988, the term “aggravated felony” first appeared in the INA as a result of the Anti-Drug Abuse Act.⁵⁹ The Anti-Drug Abuse Act amended the INA to require the deportation of aliens who committed an “aggravated felony,”⁶⁰ defined as “murder, any drug trafficking crime . . . or any illicit trafficking in any firearms or destructive devices . . . or any attempt or conspiracy to commit any such act, committed within the United States.”⁶¹ Two years after the Anti-Drug Abuse Act made an “aggravated felony” a deportable offense, the Immigration Act of 1990 expanded the definition of “aggravated felony” to include crimes of violence.⁶² Under the 1990 Act, a crime of violence was any offense described in 18 U.S.C. § 16 “for which the term of imprisonment imposed . . . was

55. See *infra* nn. 62–63 and accompanying text (discussing the relationship between aggravated felonies and crimes of violence).

56. INA § 237.

57. INA § 101(a)(43)(A)–(U).

58. *Anti-Drug Abuse Act of 1988*, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1988).

59. *Id.*

60. *Id.* at § 7344.

61. *Id.* at § 7342.

62. *Immigration Act of 1990*, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978 (1990).

at least [five] years.”⁶³ After 1990, the definition of crime of violence in 18 U.S.C. § 16 was inexorably linked to deportation.

B. Crimes of Violence and Deportation

While the phrase “crime of violence” in 18 U.S.C. § 16 originally encompassed a specific group of particularly dangerous crimes, the definition of the phrase has expanded over the years to include relatively minor offenses.⁶⁴ In 1984, Congress first enacted the definition of crime of violence in 18 U.S.C. § 16, as part of the Comprehensive Crime Control Act (CCCA).⁶⁵ Pursuant to this amendment, a crime of violence is now defined as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.⁶⁶

At the outset, Congress intended the definition of crime of violence in 18 U.S.C. § 16 to encompass offenses such as murder, burglary, and rape, as well as other violent crimes.⁶⁷ While the

63. *Id.* at § 501.

64. *See Oyebanji*, 418 F.3d at 264 (stating that “[t]he quintessential violent crimes—murder, assault, battery, rape, etc.—involve the intentional use of actual or threatened force against another’s person, . . . Oyebanji’s crime [of vehicular homicide], although plainly regarded by New Jersey as involving a substantial degree of moral culpability, did not involve the intentional use of force but instead required only recklessness”).

65. *Comprehensive Crime Control Act of 1984*, Pub. L. No. 98-473, § 1001(a), 98 Stat. 1976, 2136 (codified at 18 U.S.C. § 16 (2000)).

66. 18 U.S.C. § 16.

67. Michael G. Salemi, Student Author, *DUI as a Crime of Violence under 18 U.S.C. § 16(B); Does a Drunk Driver Risk “Using” Force?* 33 *Loy. U. Chi. L.J.* 691, 696 (2002). Salemi discusses how § 23-1331 (2001) of the Code for the District of Columbia provided the basis for 18 U.S.C. § 16. *Id.* at 697 nn. 39–40 and accompanying text. The District of Columbia statute defines a crime of violence as:

Murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses.

D.C. Code Ann. § 23-1331 (2001).

language of 18 U.S.C. § 16 has remained the same, the crimes of murder, rape, and burglary are no longer the primary offenses that constitute crimes of violence.⁶⁸ Taking advantage of the absence of a mental requirement in 18 U.S.C. § 16,⁶⁹ federal courts, immigration courts, and the Board of Immigration Appeals (BIA) continue to expand the interpretation of crimes of violence to include offenses such as misdemeanor assault,⁷⁰ misdemeanor sexual battery,⁷¹ misdemeanor child abuse,⁷² criminal trespass,⁷³ criminal contempt,⁷⁴ involuntary manslaughter,⁷⁵ stalking,⁷⁶ possession of an unregistered firearm,⁷⁷ unauthorized use of a motor

68. See *infra* nn. 70–79 (discussing the offenses that are now classified as crimes of violence).

69. See *supra* nn. 38–41 and accompanying text (discussing the failure of 18 U.S.C. § 16 to include a mental requirement).

70. E.g. *U.S. v. Urias-Escobar*, 281 F.3d 165, 166 (5th Cir. 2002) (upholding a sentence enhancement on a re-entry offense based on the defendant-alien's previous commission of misdemeanor assault, a crime of violence); but see *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003) (holding that third degree assault is not a crime of violence); *U.S. v. Vargas-Duran*, 356 F.3d 598, 603–606 (reasoning that the definition of crimes of violence in § 2L1.2 of the Sentencing Guidelines requires the intentional use of force and holding that intoxication assault, a strict liability crime, was not a crime of violence); see also *Popal v. Gonzalez*, 416 F.3d 249, 254–255 n. 5 (3d Cir. 2005) (noting that although some legislative history indicates that Congress intended to include simple assault as a crime of violence, Congress likely contemplated traditional common law assault with a *mens rea* of specific intent and concluded that assault with a *mens rea* of recklessness is not a crime of violence).

71. *Wireko v. Reno*, 211 F.3d 833, 835 (4th Cir. 2000) (holding that misdemeanor sexual battery in violation of § 18.2-67.4 of the Code of Virginia is a crime of violence).

72. *U.S. v. Saenz-Mendoza*, 287 F.3d 1011, 1013 (10th Cir. 2002) (discussing an alien who conceded that his misdemeanor child abuse constituted an aggravated felony); but see *In re Sweetser*, 22 I. & N. Dec. 709, 714–715 (BIA 1999) (holding that criminally negligent child abuse under § 18-6-401(1) of the Colorado Revised Statutes is not a crime of violence pursuant to 18 U.S.C. § 16).

73. *U.S. v. Delgado-Enriquez*, 188 F.3d 592, 595 (5th Cir. 1999) (holding that the Colorado offense of criminal trespass is a crime of violence).

74. *In re Aldabesheh*, 22 I. & N. Dec. 983, 986 (BIA 1999) (holding that criminal contempt in the first degree is a crime of violence).

75. *Park*, 252 F.3d at 1018 (holding that involuntary manslaughter is a crime of violence); but see *Jobson*, 326 F.3d at 376 (holding that second-degree manslaughter is not a crime of violence).

76. *In re Malta-Espinoza*, 23 I. & N. Dec. 656, 658 (BIA 2004) (acknowledging that stalking can occur without the use of force, but holding that stalking is a crime of violence because “a ‘course of conduct’ that is both serious and continuing in nature . . . coupled with a ‘credible threat’ to another’s ‘safety’ . . . [presents] a substantial risk that physical force may be used, at least recklessly, over the duration of the commission of the crime”).

77. *U.S. v. Rivas-Palacios*, 244 F.3d 396, 397–398 (5th Cir. 2001) (holding that unlawful possession of an unregistered firearm is a crime of violence); but see *U.S. v. Diaz-Diaz*, 327 F.3d 410, 414 (5th Cir. 2003) (holding that possession of a short barrel firearm is not a

vehicle,⁷⁸ and vehicular homicide.⁷⁹ The definition of crimes of violence has come to provide a mechanism through which minor crimes form the basis of deportation.⁸⁰ One explanation for the expanding scope of the crime of violence provision in 18 U.S.C. § 16 is the theory that deporting more criminal aliens will lead to greater national security.⁸¹

III. THE LINK BETWEEN IMMIGRATION LAW AND NATIONAL SECURITY

In 1996, Congress passed the AEDPA⁸² and the IIRIRA.⁸³ Together, these two acts represent the most significant expansion in crime-related deportation since the enactment of the INA. AEDPA removed jurisdiction from the federal courts to review the final deportation orders of criminal aliens⁸⁴ and repealed law

crime of violence under 18 U.S.C. § 16(b)). Indeed, the Eleventh Circuit has determined that, in light of *Leocal*, a conviction for a felon in possession of a firearm is not a crime of violence. *U.S. v. Johnson*, 399 F.3d 1297, 1302 (11th Cir. 2005).

78. *U.S. v. Galvan-Rodriguez*, 169 F.3d 217, 219 (5th Cir. 1999) (holding that unauthorized use of a motor vehicle is a crime of violence); see also *Ramirez v. Ashcroft*, 361 F. Supp. 2d 650, 656 (S.D. Tex. 2005) (determining that after *Leocal*, the offense of unauthorized use of a motor vehicle is still a crime of violence because “[a]n unauthorized driver is likely to use physical force to gain access to a vehicle and to drive it” but stating that “[i]t would be helpful to have [*Galvan-Rodriguez*] reexamined by the appellate court in light of *Leocal*”).

79. *U.S. v. Gonzalez-Lopez*, 335 F.3d 793, 799 (8th Cir. 2003) (holding that vehicular homicide is a crime of violence under § 2L1.2 of the United States Sentencing Guidelines); but see *Francis v. Reno*, 269 F.3d 162, 173–174 (3d Cir. 2001) (holding that a misdemeanor conviction for vehicular homicide in Pennsylvania, defined as recklessly or negligently causing the death of another, was not a crime of violence).

80. See *supra* nn. 70–79 and accompanying text (listing minor crimes).

81. Stoffer, *supra* n. 26, at 15 (observing that “[i]mmigration has always had an uncomfortable seat in the U.S. economic theater, but the terrorist [sic] attacks in New York, Washington and Pennsylvania—triggered in part by illegal aliens—amplified awareness of America’s potential for exploitation by undocumented foreign enemies”). Stoffer states that a “2002 study of 48 terrorists revealed that at least 21 had violated U.S. immigration laws before taking part in terrorism activities.” *Id.* at 14.

82. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

83. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

84. 110 Stat. at 1214, 1265, 1276–1277; see also *Calcano-Martinez v. INS*, 533 U.S. 348, 350–352 (2001) (finding that IIRIRA precludes direct federal appellate jurisdiction to review final deportation orders of aliens convicted of aggravated felonies but allows the filing of habeas petitions in district court); *Demore v. Kim*, 538 U.S. 510, 521–523, 531 (2003) (finding that the jurisdiction-stripping provision of the IIRIRA requiring the detention of criminal aliens during deportation proceedings is constitutional as Congress has broad power to regulate immigration and “regularly makes rules that would be unacceptable if applied to citizens” (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976))).

granting habeas corpus review.⁸⁵ The limitation on judicial review reflects a desire to “dismiss[] all criminal aliens’ appeals as a matter of law.”⁸⁶ Furthermore, AEDPA added eight offenses to the list of aggravated felonies.⁸⁷ IIRIRA also drastically impacted crime-related deportation by reducing the term of imprisonment⁸⁸ in the definition of a crime of violence from five years to one year.⁸⁹ All crime-related amendments under IIRIRA are retroactive and, therefore, apply regardless of when the alien’s conviction occurred.⁹⁰

AEDPA and IIRIRA are the products of an intense antiterrorism movement in Congress, which apparently began with the World Trade Center bombing in 1993 and was exacerbated by the Oklahoma City bombing in 1995, as well as the Atlanta Olympic bombing in 1996.⁹¹ Although Congress agreed on the importance of halting terrorist attacks at the time it passed AEDPA and

85. 110 Stat. at 1268.

86. Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 Okla. L. Rev. 697, 702–703 (1998) (quoting Peter Hill, *Did Congress Eliminate All Judicial Review of Orders of Deportation, Exclusion, and Removal for Criminal Aliens?* 44 Fed. Law. 42, 44 (Mar.–Apr. 1997)).

87. 110 Stat. at 1276–1277.

88. The IIRIRA provides that the “term of imprisonment” includes “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.” 110 Stat. at 3009-628.

89. *Id.* at 3009-627.

90. *Id.* at 3009-628.

91. *E.g.* 141 Cong. Rec. E596 (daily ed. Mar. 14, 1995) (This text originates from an advertisement by the American Jewish Committee that was incorporated into the record by Hon. Charles Schumer. It provides, “Since the World Trade Center bombing two years ago, terrorists espousing a radical, vengeful interpretation of Islam have struck in Buenos Aires (for the second time), Panama, London, Cairo, Algiers and throughout Israel. . . . [T]he U.S. and like-minded nations must intensify their cooperation in the fight against terrorism, making it an urgent international priority. Intelligence-gathering and investigative resources must be increased, border control procedures reassessed, and the flow of financial support to terrorist ‘charities’ blocked, consistent with constitutional safeguards.”); *see also* 142 Cong. Rec. H9384 (daily ed. July 31, 1996) (statement of Rep. Rosa DeLauro) (“I was in Atlanta this past weekend, and I felt the aftershocks of the pipe bomb explosion in Centennial Park. The true spirit of the games, the athletes, and the spectators shone through, and everyone agreed that . . . we should not bow to hostile acts of terror; but people also felt equally strongly that Congress must act to prevent this violence.”); 141 Cong. Rec. S6080 (daily ed. May 3, 1995) (message from President William Jefferson Clinton) (“The tragic bombing of the Murrah Federal Building in Oklahoma City on April 19th stands as a challenge to all Americans to preserve a safe society. In the wake of this cowardly attack on innocent men, women, and children, . . . we must ensure that law enforcement authorities have the legal tools and resources they need to fight terrorism.”).

IIRIRA, many legislators were concerned about the laws' seemingly irrelevant and harsh impact on aliens who were not suspected of participating in terrorist activity.⁹² For example, during the debate regarding the passage of AEDPA, Representative Patsy Mink stated as follows:

We are all legitimately disturbed with terrorism and violence in our communities. However, it is wrong to place upon legal immigrants a higher penalty for crimes which in themselves are not related to terroristic actions. Deportation should be reserved for only the most heinous of crimes rend[er]ing the person unfit to remain in the country. . . . The only way out for now is to encourage aliens to become U.S. citizens and avoid this jeopardy.⁹³

Like the debate regarding AEDPA, the debate surrounding the passage of the IIRIRA reflects concern about the legislation's impact on legal immigrants.⁹⁴ While the impetus behind IIRIRA appears to have been a growing concern regarding the impact of illegal immigration on unemployment and social services such as welfare and public schooling,⁹⁵ IIRIRA went far beyond regulating

92. *E.g.* 142 Cong. Rec. E646 (daily ed. Apr. 25, 1996) (statement of Hon. Patsy T. Mink) ("Moreover, I regret that this legislation is being used as a vehicle to advance anti-immigrant attitudes. This bill increases the number of criminal activities that legal aliens can be deported for. Most of the additional offenses are not required to be linked to terrorism. Listed among these offenses are; prostitution, bribery, counterfeiting, forgery, vehicle theft, false immigration documents, obstruction of justice, perjury, bribery of witnesses, and failure to appear in court. I am deeply concerned that these provisions expand authorization for deportation of aliens with any association with crimes of violence or terrorism.").

93. *Id.*

94. *E.g.* 141 Cong. Rec. S18914 (daily ed. Dec. 19, 1995) (state. of Sen. Spencer Abraham) ("In general, this bill would combine measures aimed at reducing illegal immigration with dramatic reductions in legal immigration. In my view, illegal and legal immigration are very different issues. Illegal immigration is a significant national problem, one that we should address by discussing ways to deal with people who cross our borders unlawfully. In contrast, legal immigrants are overwhelmingly law-abiding and hardworking people who contribute to our economy and our society. We should deal with the real problem of illegal immigration without retreating from America's historic commitment to legal immigration.").

95. 141 Cong. Rec. E127 (daily ed. Jan. 19, 1995) (state. of Hon. Anthony Beilenson) ("The United States has by far the most generous legal immigration system in the world. We allow more people—nearly 1 million a year—to immigrate here than do all other countries combined, and more newcomers are settling here legally every year than at any other time in our history. . . . Illegal immigration has already had an enormous effect on public services and labor markets in certain areas of the country, and the problems will only get

illegal immigration in the context of social services. The impact of IIRIRA on crime-related deportation⁹⁶ indicates that IIRIRA, like AEDPA, was essentially a national security measure. Through AEDPA and IIRIRA, Congress has “created an all but irrebuttable presumption that all aggravated felons are a ‘danger to the community of the United States.’”⁹⁷

The USA PATRIOT Act⁹⁸ provides evidence of the solid conceptual link between national security and crime-related deportation.⁹⁹ The most recent amendments to the INA, which the USA PATRIOT Act implemented, broaden the definition of terrorism under the INA¹⁰⁰ and mandate detention for suspected terrorists.¹⁰¹ These amendments are significant to crime-related deportation. The purpose underlying the amendments to the INA,¹⁰² enhancing security and protecting Americans from a variety of threats, echoes the policy underlying crime-related deportation.¹⁰³ An additional link flows from the fact that “terrorism” is difficult

worse.”).

96. See *supra* nn. 88–90 and accompanying text (discussing the impact of IIRIRA on crime-related deportation); *infra* nn. 123–124 and accompanying text (discussing the increased number of crime-related deportations since the 1996 amendments).

97. Newcomb, *supra* n. 86, at 703 (quoting Hill, *supra* n. 86, at 45).

98. 115 Stat. at 272.

99. Sen. Jud. Comm., *Oversight of the Department of Justice: Terrorism and Other Topics*, 108th Cong. (June 8, 2004) (statement of Attorney General John Ashcroft) [hereinafter *Ashcroft Statement*] (“We will continue to fight terrorism using all the tools at our disposal. . . . The Justice Department and the American people have [benefited] tremendously in preventing terrorism, thanks to the Patriot Act. This important bipartisan legislation removed the bureaucratic wall between law enforcement and intelligence.”).

100. 115 Stat. at 345–350.

101. *Id.* at 350–351.

102. See *id.* at preamble (stating that the PATRIOT Act was enacted “[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes”).

103. In the debate surrounding the passing of the PATRIOT Act, Senator Hatch stated as follows:

I personally believe that if these tools [in the PATRIOT Act] had been in law—and we have been trying to get them there for years—we would have caught those [9/11] terrorists. If these tools could help us now to track down the perpetrators—if they will help us in our continued pursuit of terrorists—then we should not hesitate to enact these measures into law. God willing, the legislation we pass today will enhance our abilities to protect and prevent the American people from ever again being violated as we were on September 11.

147 Cong. Rec. S11015 (daily ed. Oct. 25, 2001) (state. of Senator Orrin Hatch); see also *supra* nn. 18–22 and accompanying text (discussing the policy implications of crime-related deportation).

to define and to prove,¹⁰⁴ especially under current INA provisions relating to terrorism.¹⁰⁵ From the perspective of the Department of Justice, crime-related immigration laws provide a supplementary mechanism for identifying and removing suspected terrorists¹⁰⁶ without having to prove that these individuals are actually involved in terrorism.¹⁰⁷

For example, consider the deportation proceedings of Nacer Eden Fetamia, a citizen of Algeria who worked in the United States as a flight instructor and private pilot.¹⁰⁸ According to an FBI spokesperson, FBI agents were investigating Fetamia “well before September 11.”¹⁰⁹ He had become a lawful permanent resident of the United States in 1982.¹¹⁰ In 1994, Fetamia pled guilty to bank fraud involving misrepresentations on a loan application and was sentenced to one day in prison and three years of proba-

104. Aaron J. Noteboom, Student Author, *Terrorism: I Know It When I See It*, 81 Or. L. Rev. 553, 571–572 (2002) (discussing the dangers and difficulties of the “loosely worded definition” of terrorism in criminal codes within the United States and stating that the definition of terrorism as “violent’ or ‘dangerous’ acts again arbitrarily limits those acts that may be considered terrorism”).

105. For an example of such a definition, see INA § 212(3)(B)(iv)(IV), which makes fundraising for terrorist organizations a deportable offense. Theodore Roosevelt observed in 1908 that recently criminalized behavior is difficult to regulate: “Every new social relation begets a new type of wrongdoing—of sin, to use an old-fashioned word—and many years always elapse before society is able to turn this sin into crime which can be effectively punished at law.” Theodore Roosevelt, *Eighth Annual Message to Congress on December 8, 1908*, <http://www.geocities.com/presidentialspeeches/1908.htm?20056> (accessed Mar. 6, 2005).

106. *Ashcroft Statement*, *supra* n. 99, at “Fighting Terrorism.” Ashcroft further addressed how immigration laws have played a role in “fighting terrorism”:

[W]e have charged hundreds of airport workers with falsifying documents and violating immigration laws at airports nationwide. At Dulles and Reagan National Airports in Virginia, 94 workers were arrested for allegedly falsifying Social Security applications and violating immigration laws. In Charlotte, North Carolina, 67 undocumented aliens were indicted for document fraud.

Id. For commentary on crime as a form of terrorism, see Sen. Subcomm. on Crime & Drugs of the Jud. Comm., *Homeland Security: Assessing the Needs of Local Law Enforcement*, 107th Cong. 8–11 (Mar. 21, 2002) (state. of Mayor Patrick Henry Hays) (“The worst terrorist to most of us in America is the one who lives next door and who, through fear of daily crime, keeps you from living your life. . . . We must ensure that cities have the resources needed to fight both the domestic war on terrorism and the continuing war against crime.”).

107. See Noteboom, *supra* n. 104, at 571–572 (stating that a loosely worded definition of terrorism lends itself to potential abuse by governments that could “knock down the doors of citizens based on little more than appearance”).

108. Bill Miller, *Costly Convictions*, Star-Telegram Dallas Bureau 1B (June 27, 2004).

109. *Id.*

110. *Id.*

tion.¹¹¹ In 2002, he pled guilty and was sentenced to three months of confinement for failing to disclose a 1986 conviction for driving while intoxicated on his Federal Aviation Administration renewal license application.¹¹² Upon his release in 2003, Fetamia was charged with removability as an aggravated felon and as an alien who had committed two crimes involving moral turpitude.¹¹³ While awaiting deportation proceedings, Fetamia was placed in mandatory detention after ICE determined that he was a flight risk.¹¹⁴ Fetamia petitioned for habeas corpus relief, which was denied when the district court determined that he was ineligible for cancellation of removal under the INA.¹¹⁵ Fetamia describes his experience as “ethnic cleansing in a legal way.”¹¹⁶

Ambiguity within the definition of crimes of violence, as well as within the definitions of other crime-related bases for removal,¹¹⁷ provides DHS with an additional basis for deporting

111. *See Fetamia v. Ridge*, 2004 WL 1194458 at *1 (N.D. Tex. 2004).

112. *Id.* at **1–2.

113. *Id.* at *2.

114. Miller, *supra* n. 108, at 2 (stating that on the day Fetamia was to be released after pleading guilty to the 1986 conviction, immigration officials faxed the warden in Pecos, Texas, and asked that Fetamia be held without bond pending deportation proceedings); *see also Fetamia*, 2004 WL 1194458 at *2 (discussing how Fetamia was held without bond as a result of ICE involvement).

115. *Fetamia*, 2004 WL 1194458 at *7.

116. Miller, *supra* n. 108.

117. Courts also have difficulty defining “crimes involving moral turpitude.” For example, in 1976, the BIA held that aggravated assault is a crime involving moral turpitude. *In re Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976). The BIA reasoned that reckless conduct can be a crime involving moral turpitude. *Id.* However, in 1962, prior to its decision in *Medina*, the BIA had stated that reckless conduct does not indicate moral turpitude. *In re Szegedi*, 10 I. & N. Dec. 28, 34 (BIA 1962) (reasoning that “voluntariness or intent to commit the act or *some* act must exist before we can find that the crime involves moral turpitude”). These cases were expressly overruled by *In re Franklin*, suggesting the BIA’s tendency to expand the number of deportable offenses, even at the cost of inconsistency. 20 I. & N. Dec. 867, 871 (BIA 1994). In the 1996 case *In re Fualaau*, the BIA held that the offense of assault in the third degree pursuant to Hawaii Revised Statute § 707-712 (1992) does not constitute a crime involving moral turpitude, although the language of the statute requires, at a minimum, “recklessly caus[ing] bodily injury to another.” 21 I. & N. Dec. 475, 476–477 (BIA 1996). The BIA stated that for an offense to be deemed a crime involving moral turpitude, the recklessness *mens rea* “must be coupled with an offense involving the infliction of serious bodily injury” and may involve the use of a weapon. *Id.* at 477–478. The BIA thus distinguished between simple assault and aggravated assault, finding that a reckless mental state was not the only consideration. *Id.* While the scope of this Comment is limited to a discussion of “crimes of violence” and the Supreme Court’s suggestion in *Leocal* that a “crime of violence” must be intentional, it is important to at least recognize that *mens rea* requirements affect other areas of crime-related deportation as well.

suspected terrorists.¹¹⁸ While the deportation of aliens for minor offenses has received much criticism¹¹⁹ and has spurred a debate regarding immigration reform,¹²⁰ this issue is closely related to national security.¹²¹ Proponents of immigration reform who advocate for a reduction in the criminal bases for deportation must recognize the impact of these reforms on national security issues.¹²²

IV. IMMIGRATION REFORM AND CRIMES OF VIOLENCE

Shortly after Congress passed the 1996 amendments to the INA, it became clear that Congress had so expanded the crime-related grounds for deportation that long-time, lawful permanent residents were being deported for committing minor crimes.¹²³ In fact, crime-related deportation has more than doubled in the past decade.¹²⁴ This realization has sparked a debate concerning further immigration reform, with many of the critiques focusing on the lack of judicial discretion over deportation¹²⁵ and on the definition of an aggravated felony under IIRIRA.¹²⁶

118. Congress, in enacting anti-terrorism legislation, has made a link between criminals generally and terrorists. *E.g.* H.R. 3614, 108th Cong. preamble (Nov. 21, 2003) (stating that the purpose of the bill was to “ensure that the [National Instant Criminal Background Check System] provides the Federal Bureau of Investigation with information on . . . persons named in the Violent Gang and Terrorist Organization File”); Sen. 1882, 108th Cong. preamble (Nov. 18, 2003) (stating that the bill was enacted to “require that certain notifications occur whenever a query to the National Instant Criminal Background Check System reveals that a person listed in the Violent Gang and Terrorist Organization File is attempting to purchase a firearm, and for other purposes”).

119. *See supra* nn. 16–17, 92–94 and accompanying text (discussing the perceived harshness of immigration laws).

120. *E.g. The Restoration of Fairness in Immigration Act of 2003*, H.R. 47, 108th Cong. preamble (Jan. 7, 2003) (stating that the bill was enacted “[t]o amend the Immigration and Nationality Act to restore fairness to immigration law, and for other purposes”).

121. *Supra* pt. III (discussing the relationship between crime-related deportation and terrorism).

122. *E.g. infra* pt. IV(A) and accompanying text (discussing Rep. Conyers’ proposed immigration reform bill).

123. *See e.g.* ABA Commn. on Immig., *supra* n. 7, at 23–24 (observing that “[b]efore 1996, the same crime was not an aggravated felony unless a sentence of five years or more was imposed” and commenting that “[h]air pulling, a high school brawl, rock throwing and similar incidents are now among the many types of conduct held to be ‘crimes of violence’ resulting in automatic deportation”).

124. Miller, *supra* n. 108 (observing that “[i]n 1993, 29,458 convicted aliens were deported” while “[i]n 2002, 70,759 felons were deported”).

125. *E.g. Deportation Dispute Requires Special Legislation*, Honolulu Star-Bulletin, Editorial (June 30, 2004) (opining that “[l]egislation that would restore judicial discretion

A. Amending 18 U.S.C. § 16: Recent Developments

Representative John Conyers, Jr., recently introduced an immigration reform bill in the House of Representatives that embodied many of the strands within this debate.¹²⁷ Entitled the Restoration of Fairness in Immigration Act of 2003, this bill provided for increased judicial discretion over deportation orders and an “equitable application and definition of ‘aggravated felony.’”¹²⁸ The bill recommended that the crime of violence provision in INA § 101(a)(43)(F) be changed to its pre-1996 definition, which required that the offense carry a term of imprisonment of at least five years.¹²⁹ The bill also granted a discretionary waiver, to be determined by an immigration judge, for minor felonies.¹³⁰ The purpose of this provision was to make “relief available in cases where the person facing permanent removal from the United States committed a relatively minor offense.”¹³¹ This bill was referred to subcommittee, but was not made law.¹³²

On the other side of the debate, Senator Orrin Hatch introduced a bill “to revise and enhance criminal penalties for violent crimes.”¹³³ Titled the “Gang Prevention and Effective Deterrence Act of 2003,” the Act attempted to amend the definition of crimes of violence in 18 U.S.C. § 16(b) to read, “any other offense that is a felony and that, by its nature, involves a substantial risk of physical force or injury against the person or property of another.”¹³⁴

in the handling of immigrant crime is languishing in Congress while a young Filipino immigrant resident of Maui faces unfair deportation orders”). In response to arguments such as these, proponents state that “[t]he discretion needed to be removed because it was being abused. . . . It was a massive loophole.” Miller, *supra* n. 108 (quoting Dan Stein, executive director of the Federation for American Immigration Reform).

126. Newcomb, *supra* n. 86, at 717.

127. H.R. 47, 108th Cong.; 149 Cong. Rec. E33 (daily ed. Jan. 8, 2003) (statement of Rep. John Conyers, Jr.) (advocating that the Restoration of Fairness in Immigration Act of 2003 “restores fairness to the immigration process by making sure that each person has a chance to have [his or her] case heard by a fair and impartial decision-maker”).

128. H.R. 47, 108th Cong. at § 202.

129. *Id.* at § 202(b).

130. *Id.* at § 202(d).

131. H. Jud. Comm. Democratic Members, *Section by Section Description of the Restoration of Fairness in Immigration Law of 2002*, H.R. 47, 108th Cong. at § 202(d) (available at http://www.house.gov/judiciary_democrats/immhr3894secbysec.pdf).

132. GovTrack.us, *H.R.47[108]: Restoration of Fairness in Immigration Act of 2003*, <http://www.govtrack.us/congress/bill.xpd?bill=h108-47> (accessed Mar. 8, 2006).

133. Sen. 1735, 108th Cong. preamble (Oct. 15, 2003).

134. *Id.* at §§ 1(a), 206.

The bill proposed removing the language in 18 U.S.C. § 16(b) that states the risk must involve the “use” of force in the commission of the offense.¹³⁵ The proposed amendment was rejected by the Senate Judiciary Committee.¹³⁶ Senator Russell Feingold objected to the revised version of 18 U.S.C. § 16 because of the Supreme Court’s anticipated ruling in *Leocal* and because the revised definition would “affect too many lives.”¹³⁷ Senator Feingold observed that “the revised definition makes negligent, reckless acts crimes of violence, as well as acts that only affect property,” and that the “proper place to settle the definition of a crime of violence was in the courts.”¹³⁸

B. The Supreme Court’s Interpretation of Crimes of Violence:
Leocal v. Ashcroft

In *Leocal*, the Supreme Court addressed whether a Florida driving under the influence (DUI) conviction is a crime of violence as defined in 18 U.S.C. § 16.¹³⁹ The petitioner in *Leocal* was a lawful permanent resident who had been ordered removed by the BIA after being convicted in Florida of two counts of DUI causing serious bodily injury.¹⁴⁰ The United States Court of Appeals for the Eleventh Circuit, relying on precedent holding that a conviction under Florida’s DUI statute was a crime of violence,¹⁴¹ dismissed the petitioner’s appeal.¹⁴² In a unanimous opinion, the Supreme Court reversed the Eleventh Circuit, reasoning that Florida’s DUI statute, which does not have a *mens rea* requirement, does not satisfy the statutory definition of a crime of violence under 18

135. *Id.* at § 206. In effect, such an amendment would eliminate the judiciary’s ability to imply a mental requirement within the statute by finding that the “physical force” under 18 U.S.C. § 16(b) must be “intentional.” For an example of how courts imply a mental requirement, see *Bazan-Reyes*, 256 F.3d at 611 (stating that the word “use” in 18 U.S.C. § 16(a) “implies intentional availment” and that “the words ‘may be used’ in § 16(b) also contain an intent requirement”).

136. *Senate Judiciary Committee Considers Several Immigration-Related Bills*, 81 Interpreter Releases 764, 765 (June 7, 2004).

137. *Id.* at 766.

138. *Id.*

139. *Leocal*, 125 S. Ct. at 379.

140. *Id.*

141. *Id.* at 380.

142. *Id.*

U.S.C. § 16.¹⁴³ The Supreme Court also suggested that statutes defining DUI offenses that include a *mens rea* requirement of negligence are not crimes of violence.¹⁴⁴ The Court reasoned as follows: “While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident.”¹⁴⁵ The Court concluded that 18 U.S.C. § 16 contemplated “a category of violent, active crimes that cannot be said naturally to include DUI offenses.”¹⁴⁶

While the Court’s decision resolved the circuit split with regard to whether a DUI constitutes a crime of violence,¹⁴⁷ it explicitly left open the question of whether a crime with a *mens rea* of recklessness is a crime of violence.¹⁴⁸ In fact, the Court stated at the end of the opinion that “[t]his case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against the person or property of another qualifies as a crime of violence under 18 U.S.C. § 16.”¹⁴⁹ However, in concluding that a DUI was not a crime of violence, the Court stated that the language of 18 U.S.C. § 16(a) “suggests a higher degree of intent than negligent *or merely accidental conduct*.”¹⁵⁰ Based on an extension of the Court’s reasoning in *Leocal*, crimes that otherwise meet the definition set out in 18 U.S.C. § 16 should not be deportable offenses when they have a *mens rea* of recklessness, as this mental requirement reflects “merely accidental conduct.”¹⁵¹ Several courts have recognized that a *mens rea* of

143. *Id.* at 383–384.

144. *Id.* at 383 (reasoning that “[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the ‘violent’ crimes Congress sought to distinguish for heightened punishment and other crimes”).

145. *Id.* at 382 (emphasis in original).

146. *Id.* at 383.

147. Compare *U.S. v. Lucio-Lucio*, 347 F.3d 1202, 1206, 1208 (10th Cir. 2003) (reasoning that while a “burglar is reckless of the risk of committing an intentional act of violence; a drunk driver is reckless of the risk that he will accidentally cause harm,” and holding that a DWI conviction in Texas is not a crime of violence) with *In re Puente-Salazar*, 22 I. & N. Dec. 1006 (BIA 1999) (holding that a DWI is a crime of violence) (overruled by *In re Ramos*, 23 I. & N. Dec. 336, 336–337 (BIA 2002)).

148. *Leocal*, 125 S. Ct. at 384.

149. *Id.* (emphasis in original).

150. *Id.* at 382 (emphasis added).

151. See Mitchell Keiter, *With Malice toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. Rev. 261, 290–291 (2004) (drawing a distinction between intentional action and hapless, reckless conduct,

recklessness reflects accidental conduct.¹⁵² Furthermore, as discussed below,¹⁵³ it is difficult to draw a meaningful distinction between criminal negligence and recklessness.¹⁵⁴

V. CONTEMPORARY ANALYSIS OF CRIMES OF VIOLENCE UNDER 18 U.S.C. § 16

In determining whether a particular offense constitutes a crime of violence, courts are faced with several issues based on the statutory language of 18 U.S.C. § 16.¹⁵⁵ As discussed below, the implied mental requirement, which the Supreme Court sanctioned in *Leocal*,¹⁵⁶ is only one of many issues that causes inconsistencies with respect to the offenses courts define as crimes of violence.¹⁵⁷

and stating that “[p]erhaps the most influential justification for the intent requirement is the allegedly heightened danger posed by purposeful actors, as opposed to those who are merely reckless as to the harmful consequence”); see also *Oyebanji*, 418 F.3d at 263 (relying on the “merely accidental conduct” statement to hold that vehicular homicide with a *mens rea* of recklessness is not a crime of violence).

152. *E.g. Jobson*, 326 F.3d at 373 (holding that second-degree manslaughter under New York Penal Law § 125.15(1) is not a crime of violence because “an unintentional accident caused by recklessness cannot properly be said to involve a substantial risk that a defendant will use physical force”); *Lucio-Lucio*, 347 F.3d at 1206 (drawing a distinction between reckless behavior of persons, such as a drunk driver who “typically does not mean to cause an accident at all,” and a burglar, who acts intentionally, reasoning that “[a]lthough the drunk driver recklessly risks harming others, the risk is not that this will happen intentionally (as in burglary)”).

153. *Infra* nn. 224–239 and accompanying text (discussing how little negligence varies from recklessness).

154. See Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and under the Model Penal Code*, 18 Ga. St. U. L. Rev. 341, 367–380 (2001) (discussing the difficulties courts face in defining general intent, and the resultant tendency of judges “to flex the definition of general intent to achieve the results they consider appropriate regarding individual crimes and individual cases”). Batey refers to a Florida court case analyzing the intent requirement for vehicular homicide, in which the opinion suggests that “recklessness equals willfulness, which equals knowledge, but all of them reflect a less demanding standard than culpable negligence!” *Id.* at 377 (citing *Lewek v. State*, 702 So. 2d 527, 531 (Fla. 4th Dist. App. 1997)). Batey observes that “[s]uch incoherence bespeaks serious confusion.” *Id.* Batey points out that the conflation between negligence and recklessness is particularly severe in the crime of unintentional, “depraved heart” murder, which he argues should at the very least require recklessness, but which most courts construe as requiring criminal negligence. *Id.* at 377–378.

155. For the statutory language of 18 U.S.C. § 16, see note 38 and accompanying text.

156. See *infra* nn. 190–196 and accompanying text (discussing the Supreme Court’s analysis of the implied mental requirement in 18 U.S.C. § 16).

157. A survey of the many issues that plague the definition of crimes of violence is beyond the scope of this Comment.

A. Preliminary Issues in Interpreting 18 U.S.C. § 16

Under immigration law, the term “felony” includes crimes that states classify as misdemeanors.¹⁵⁸ Federal law provides a definition of “felony” that requires an offense to have a “possible sentence of more than one year, not exactly one year or less than one year.”¹⁵⁹ However, the BIA has not indicated whether this definition should be used to determine the meaning of the word “felony” in 18 U.S.C. § 16(b).¹⁶⁰ Thus, when a state classifies an offense as a misdemeanor but provides for a possible sentence of more than one year, the offense can be considered a “felony” for deportation purposes even though it would not be considered a felony under the federal definition. For example, in *United States v. Urias-Escobar*,¹⁶¹ the respondent was convicted of misdemeanor assault and sentenced to a year in prison.¹⁶² Although the respondent’s sentence was suspended, the United States Court of Appeals for the Fifth Circuit found that the respondent’s conviction satisfied the one-year requirement in 8 U.S.C. § 1101(a)(43)(F) and, therefore, could be considered a felony.¹⁶³ In reaching this conclusion, the Fifth Circuit stated as follows:

Though Urias-Escobar is correct that federal law traditionally defines a felony as a crime punishable by *over* one year’s imprisonment, . . . the plain language of [8 U.S.C. § 1101(a)(43)(F)] says otherwise. . . . Whatever the wisdom of Congress’s decision to alter the historic one-year line between a misdemeanor and a felony, the statute is unambiguous in its sweep.¹⁶⁴

The expanded definition of a felony is complemented by the INA’s definition of a “conviction.” Pursuant to INA

158. Sandy Lin, *What Is a Felony for Purposes of the Crime of Violence Definition in 18 U.S.C. § 16(b)*, Natl. Immig. Project 1 (June 2, 2004) (available at <http://www.nationalimmigrationproject.org/CrimPage/CrimPage.html>) (providing a practice pointer for immigration attorneys).

159. *Id.* at 2.

160. *Id.*

161. 281 F.3d 165, 166 (5th Cir. 2002).

162. *Id.*

163. *Id.* at 167. The interpretation of 18 U.S.C. § 16(b) also would be far less important if state court judges would limit sentences for minor crimes to less than one year, thereby taking these offenses outside the statutory definition of crimes of violence.

164. *Id.* (emphasis in original).

§ 101(a)(48)(A)(i) and (ii), a conviction is a “formal judgment of guilt [of the alien] entered by a court,” or, if adjudication is withheld, a conviction is established when “a judge or jury has found the alien guilty or [the alien] has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilty, [and] the judge has ordered some form of punishment,” which can include probation.¹⁶⁵ As one commentator has explained, some prosecutors at the state level recognize that the expanded definition of “conviction” for purposes of immigration law, combined with the definition of “felony,” leaves them in an “untenable position” when trying to determine how to charge aliens for their criminal conduct, due to the harsh immigration consequences of such charges.¹⁶⁶

B. Common Issues Related to 18 U.S.C. § 16(a) and § 16(b)

As a preliminary matter, a distinction must be drawn between 18 U.S.C. § 16(a), which applies to all crimes, and 18 U.S.C. § 16(b), which only applies to a felony “that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”¹⁶⁷ While the distinction was originally intended to restrict the definition of crimes of violence under 18 U.S.C. § 16(b),¹⁶⁸ many misdemeanor crimes have now been construed by

165. *In re Ozkok*, 19 I. & N. Dec. 546, 546 (BIA 1988).

166. Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. 1411, 1454–1455 (2005) (citations omitted). In his 2005 article on the subject, Robert A. Mikos stated as follows:

Indeed, prosecutors have acknowledged manipulating state charges to circumvent federal deportation. For example, in one case, a Michigan prosecutor admitted charging a young immigrant boy with a lesser offense in order to stave off deportation and keep his family in the United States. The change in charge was quite dramatic: the initial charged offense was first degree criminal sexual conduct (the boy had raped and impregnated his twelve-year-old sister), punishable by life in prison, whereas the ultimate offense of conviction was fourth degree criminal sexual conduct, a misdemeanor carrying a maximum sentence of two years. Commenting on the case, the prosecutor criticized the INS, saying it left him in an untenable position: “They are basically telling me that I either should not charge a 17-year-old alleged rapist, or I should have the victim of the crime deported to India along with her brother and parents. . . . Neither solution is acceptable.”

Id.

167. 18 U.S.C. § 16(b).

168. See *Francis*, 269 F.3d at 168–169 (3d Cir. 2001) (examining the legislative history behind 18 U.S.C. § 16 and concluding that “Congress intended to include felonies and

courts as “crimes of violence.”¹⁶⁹ Although 18 U.S.C. § 16(a) and (b) involve different types of offenses, multiple issues have arisen in the course of interpreting both sections.

1. *The Categorical Approach*

In general, courts have interpreted the language in 18 U.S.C. § 16 to mandate a categorical approach,¹⁷⁰ under which courts decide whether the particular offense committed by an alien is a crime of violence by examining the statutory language of the offense rather than the alien’s actual conduct.¹⁷¹ The categorical approach stems from the statutory language in 18 U.S.C. § 16(a), which defines a crime of violence as “*an offense that has as an element the use . . . of physical force against the person or property of another,*” as well as the language in 18 U.S.C. § 16(b) that defines a crime of violence as “*any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*”¹⁷² The categorical approach requires that an immigration judge or federal judge reviewing the BIA’s decision¹⁷³ may not look behind the record of conviction¹⁷⁴ to

misdemeanors under subsection (a), but only intended certain felonies to be included under subsection (b)”). In *Francis*, the Third Circuit restricted the definition of “felony” to the length of punishment imposed by state, not federal, law. *Id.* at 169 (stating that although “Congress was obviously aware that the definition of a ‘felony’ varies from jurisdiction to jurisdiction, and it could certainly have defined an ‘aggravated felony’ under the INA to include any state offense that would be classified as a felony under federal law, . . . [i]t did not do so”).

169. *Supra* nn. 70–79 (identifying the misdemeanor crimes that courts have considered to be crimes of violence under 18 U.S.C. § 16).

170. *E.g. Leocal*, 125 S. Ct. at 381 (stating that “the statute directs our focus to the ‘offense’ of conviction”); *Omar v. INS*, 298 F.3d 710, 714 (8th Cir. 2002) (stating that “[c]ourts are in general agreement that under § 16(b) a categorical or generic analysis of the nature of the felony must be conducted, rather than an examination of the facts of the individual case”).

171. Mulvaney, *supra* n. 50, at 701–702.

172. *Leocal*, 125 S. Ct. at 381 (emphasis in original) (relying on this statutory language to conclude that the Court was required to “look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner’s crime”).

173. Although federal courts technically lack jurisdiction to consider final removal orders, *see supra* n. 84, federal courts have justified their jurisdiction to consider removal orders in two ways. First, while a federal court has no jurisdiction to review a final removal order, a federal court does have jurisdiction if it determines that an alien is not removable. *See Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1219 (9th Cir. 2005) (stating that “the jurisdictional question and the merits collapse into one” (quoting *Ye v. INS*, 214 F.3d

evaluate whether the alien's conduct met the requirements of 18 U.S.C. § 16.¹⁷⁵ Courts will look to the behavior that the alien actually committed only when a statute is divisible—that is, when the statute involves both conduct that may involve the substantial risk that force will be used and conduct that does not.¹⁷⁶

In *In re Ramirez-Fierros*,¹⁷⁷ the BIA adopted the categorical approach when determining whether a conviction for battery of a law enforcement officer was a crime of violence.¹⁷⁸ The BIA found that Florida Statutes §§ 784.03 and 784.07(2)(b), criminalizing battery of a law enforcement officer, were divisible statutes because they encompassed offenses that were not crimes of violence, such as spitting on a police officer.¹⁷⁹ The BIA then reviewed the record of conviction, which stated that “Herlinda Ramirez did intentionally touch or strike Janice Stripling [the police officer] against that person’s will . . . and at the time of the battery Janice Stripling was a law enforcement officer . . . and the defendant knew Jani[c]e Stripling was a law enforcement officer.”¹⁸⁰ The BIA concluded that because the record of conviction did not indicate the nature of Ramirez’s conduct, there was “insufficient evi-

1128, 1131 (9th Cir. 2000) (internal citations omitted)). Second, federal courts have recently begun to rely on the Real ID Act § 106(a)(1)(A)(iii), Pub. L. No. 109-13, 119 Stat. 231, 310 (2005), as a basis for jurisdiction. *See Tran v. Gonzales*, 414 F.3d 464, 467 (3d Cir. 2005) (stating that “[t]he recent Real ID Act clarifies that our jurisdiction extends to ‘questions of law raised upon a petition for review,’ including petitions for review of removal orders based on aggravated felony convictions. . . . We are thus free to consider Tran’s purely legal claim that his crime was not, in fact, an aggravated felony under the relevant law”).

174. In immigration law, the “record of conviction” encompasses the “record of plea, verdict, and sentence.” 8 C.F.R. § 1003.41(a)(2), (5), (6) (2004). It does not include police reports.

175. *E.g. Omar*, 298 F.3d at 714 (explaining the general agreement among the courts that a generic or categorical analysis is appropriate when examining a felony under § 16(b)).

176. *E.g. Santapaola v. Ashcroft*, 249 F. Supp. 2d 181, 189–190 (D. Conn. 2003). The *Santapaola* court articulated this analysis as follows:

If the statute is divisible into discrete subsections or parts that do and do not involve ‘crimes of violence,’ this Court then follows what has been referred to as a ‘modified categorical approach’ in which we look to the record of conviction . . . to determine whether the actual offense of which the alien was convicted qualifies as a crime of violence.

Id.

177. 2005 WL 698473 (BIA Mar. 7, 2005) (unpublished).

178. *Id.* at *2.

179. *Id.*

180. *Id.* at *3 (quoting the record of conviction) (internal quotations omitted).

dence in the record to establish” that her conviction for battery of a law enforcement officer was a crime of violence.¹⁸¹

While the categorical approach saves precious judicial time by preventing inquiry into the facts and circumstances underlying the alien’s conviction, the approach contributes to the lack of uniformity in interpretations of crimes of violence because it relies on divergent state statutes to provide the ultimate definition of crimes of violence.¹⁸² This approach, combined with other issues related to interpreting 18 U.S.C. § 16, creates an unstable and arbitrary deportation mechanism.¹⁸³

2. What Constitutes Physical Force

Courts also disagree about the type of “force” necessary to constitute a crime of violence. Some courts interpret 18 U.S.C. § 16 so that the required force can be as little as prying open a car window,¹⁸⁴ while others require that the force be violent.¹⁸⁵ A related issue involves the type of risk created in committing a crime of violence under 18 U.S.C. § 16(b). Similar language to 18 U.S.C. § 16 is found in the United States Sentencing Guidelines, § 4B1.2(a), which states that a crime of violence “(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”¹⁸⁶ The definition of crimes of violence in the

181. *Id.*

182. Mulvaney, *supra* n. 50, at 699 (discussing how, in spite of the uniform application of the categorical approach, a circuit split arose regarding whether DUI is a crime of violence).

183. *Infra* pt. VI(B) (discussing a *mens rea* of recklessness as the basis for deportation).

184. *E.g. U.S. v. Alvarez-Martinez*, 286 F.3d 470, 476 (7th Cir. 2002) (finding that “[t]he act of prying open the window of a locked vehicle qualifies as a use of physical force against the property of another”).

185. *E.g. U.S. v. Delgado-Enriquez*, 188 F.3d 592, 595 (5th Cir. 1999) (holding that criminal trespass as defined under Colorado law is a crime of violence under 18 U.S.C. § 16(b)).

186. *Federal Sentencing Guidelines Manual* § 4B1.2. Courts have refused to extend the interpretation in *Leocal* to the crime of violence definition in § 4B1.2(a)(2) of the sentencing guidelines because “the commentary to § 4B1.2 specifically provides that ‘crime of violence’ includes ‘manslaughter.’” *U.S. v. Chauncey*, 420 F.3d 864, 877 (8th Cir. 2005) (holding that *Leocal* has no impact on its finding that involuntary manslaughter is a crime of violence for sentencing purposes); *see also U.S. v. Moore*, 420 F.3d 1218, 1223–1224

Sentencing Guidelines states that the offense must involve the “risk of physical injury,” which contemplates an analysis of the potential harm to the victim.¹⁸⁷ However, 18 U.S.C. § 16(b) states only that there be a risk of physical force; it does not contemplate an evaluation of the potential harm to the victim.¹⁸⁸ In the immigration context, courts sometimes ignore the important difference between the two statutes, thereby broadening the scope of deportation based on crimes of violence.¹⁸⁹

3. The “Use” of Physical Force and the Implied Mental Requirement

18 U.S.C. § 16 also requires that the risk to the victim created by the perpetration of the offense be the “use” of physical force. As reflected in the Supreme Court’s reasoning in *Leocal*,¹⁹⁰ courts have relied on the requirement that force must be “used” in the course of committing the offense to imply a mental requirement within the statutory definition.¹⁹¹ The implied mental requirement precludes strict liability offenses like driving under the influence from being considered crimes of violence.¹⁹² The tactic has generally been used in DUI cases,¹⁹³ but it has also been applied in finding that second degree manslaughter is not a crime of vio-

(10th Cir. 2005) (same); *U.S. v. Begay*, F. Supp. 2d 1141, 1144 (D.N.M. 2005) (same).

187. *Federal Sentencing Guidelines Manual* § 4B1.2(a)(2).

188. *See generally* 18 U.S.C. § 16 (stating that physical force must be used or risked being used).

189. *E.g. In re Sweetser*, 22 I. & N. Dec. at 716 (reasoning that “although a parent who negligently leaves a young child unattended near a body of water may risk serious ‘injury’ to the child, there is no risk that ‘force’ will be used in the commission of the offense”). Some language from *Leocal* has helped to resolve the confusion regarding risk of force and risk of injury. *See U.S. v. Albritton*, 135 Fed. Appx. 239, 243 (11th Cir. 2005) (noting that *Leocal* clarified the difference between the physical force requirements under § 4B1.2(a)(2) and those under § 16).

190. *See supra* pt. IV(B) (discussing the Supreme Court’s reasoning in *Leocal*).

191. *E.g. In re Palacios*, 22 I. & N. Dec. 434, 441, 456 (BIA 1998) (Rosenberg, J., dissenting) (quoting *Parson*, 955 F.2d at 866, and stating that 18 U.S.C. § 16 implies a willingness to commit a crime involving specific intent).

192. It should be noted that the term “general intent” refers to the common law construction of *mens rea* such that recklessness or negligence provides the basis for culpability. Batey, *supra* n. 154, at 367–380 (discussing the formations of general intent in *Doe*, 136 F.3d at 634–641). The Model Penal Code uses similar mental requirements but makes many important changes. *Id.* at 400–413.

193. *E.g. Lucio-Lucio*, 347 F.3d at 1206 (making a distinction between crimes that create the risk of intentionally causing harm versus those that involve the risk of accidentally causing harm).

lence.¹⁹⁴ Of course, some jurists reject this reading of the statute as improper, given that the statutory language in 18 U.S.C. § 16 does not include a mental requirement.¹⁹⁵ After the Supreme Court's decision in *Leocal*, however, courts will likely be forced to accept that crimes of violence must have a minimum mental requirement of at least more than negligence.¹⁹⁶

An example of how courts implied a mental requirement prior to *Leocal* is provided in *United States v. Lucio-Lucio*.¹⁹⁷ In *Lucio-Lucio*, the United States Court of Appeals for the Tenth Circuit found that the defendant's conviction for driving while intoxicated did not constitute a crime of violence under 18 U.S.C. § 16(b).¹⁹⁸ Examining the legislative history behind 18 U.S.C. § 16, the Tenth Circuit concluded that Congress meant the statute to apply to "a limited class of especially heinous offenses" that "involve far more of an intent to commit violence, or at least a willingness to commit violence if necessary, than the typical DWI offense."¹⁹⁹ The Tenth Circuit concluded that

Whatever the precise degree of intent necessary to separate violent conduct from conduct that leads to harmful consequences, it seems plain that DWI resulting in an accident—which, when it happens, is a purely unintended result—falls

194. *Jobson*, 326 F.3d at 376 (holding that a *mens rea* of recklessness is not sufficient for a crime of violence); *but see Park*, 252 F.3d at 1022, 1024–1025 (holding that a *mens rea* of recklessness is sufficient to satisfy 18 U.S.C. § 16(b) where the offense involves the substantial risk that force will be used in its commission).

195. *E.g. U.S. v. Rutherford*, 54 F.3d 370, 378 (7th Cir. 1995) (Easterbrook, J., concurring) (stating that the crime of violence provision in the Sentencing Guidelines "does not mention intent" and noting that "it specifies that an offense is a crime of violence if an element involves the use of force against a person" (emphasis in original)). Judge Easterbrook further stated that the statutory language implies that an *actus reus*, even without a *mens rea*, satisfies the crime of violence definition. *Id.*; *see also In re Alcantar*, 20 I. & N. Dec. at 813 (holding that 18 U.S.C. § 16(b) does not require the specific intent to do violence).

196. *See In re Hernandez-Villalobos*, 2005 WL 1104592 (BIA Jan. 27, 2005) (stating that "[a]ccording to the United States Supreme Court, a crime of violence under 18 U.S.C. [§§] 16(a) and 16(b) must involve a higher degree of intent than negligent or merely accidental conduct").

197. 347 F.3d 1202 (10th Cir. 2003).

198. *Id.* at 1208.

199. *Id.* at 1205.

into the latter category. Hence, DWI is not within the ambit of § 16(b).²⁰⁰

While the court in *Lucio-Lucio* implied a mental requirement to 18 U.S.C. § 16, the omission of a mental requirement in 18 U.S.C. § 16 has caused some immigration courts to completely ignore the *mens rea* component of criminal liability.²⁰¹ For example, in *Chrzanoski v. Ashcroft*,²⁰² the United States Court of Appeals for the Second Circuit ignored the crucial difference between general and specific intent.²⁰³ In *Chrzanoski*, the respondent was convicted of misdemeanor assault in the third degree under Connecticut General Statutes § 53a-61, which provides as follows:

A person is guilty of assault in the third degree when:

- (1) with intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
- (2) he recklessly causes serious physical injury to another person; or
- (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.²⁰⁴

The Government failed to specify which section of the statute the alien violated.²⁰⁵ The government argued that, at the very least, a conviction under § 53a-61(a)(1) was a crime of violence, and the alien replied that none of the sections of the statute described a crime of violence.²⁰⁶ The court quoted *Connecticut v. Tanzella*²⁰⁷ for the proposition that the “difference between reckless assault and intentional assault is simply one of mental state: “These are

200. *Id.* at 1206.

201. *E.g. Chrzanoski*, 327 F.3d at 192.

202. 327 F.3d 188 (2d Cir. 2003).

203. *Id.* at 198; *see infra* nn. 217–220 (distinguishing general and specific intent).

204. *Chrzanoski*, 327 F.3d at 192 (citing Conn. Gen. Stat. § 53a-61(a) (1996)).

205. *Id.*

206. *Id.* at 190.

207. 628 A.2d 973, 980 (Conn. 1993).

not different crimes but simply different means of committing the same crime.”²⁰⁸ The court concluded that: “[b]ecause the subsections under [§] 53a-61(a) differ only on the *mens rea* requirement, the precise subsection under which petitioner was convicted is not relevant to the question presented here.”²⁰⁹

The differences among the mental requirements are significant, however, especially in light of the Supreme Court’s subsequent suggestion that crimes with a *mens rea* of negligence may not be deportable offenses.²¹⁰ Further, the differences among criminal statutory provisions and their mental requirements are significant in criminal law.²¹¹ Especially in the immigration context, in which courts apply the categorical approach when examining these state statutes,²¹² the Supreme Court should more precisely indicate the mental requirements that constitute crimes of violence. Imposing the additional requirement that crimes of violence must involve more than recklessness would also provide a clearer set of crimes that subject an alien to deportation.

VI. STANDARDIZING CRIMES OF VIOLENCE: MENTAL REQUIREMENTS IN CRIMINAL LAW

It is a fundamental principle of criminal law that “an act does not make [a person] guilty, unless the mind be guilty.”²¹³ Mental requirements in criminal law attempt to criminalize the guilty mind.²¹⁴ In choosing a particular mental requirement to accompany a particular crime, legislative bodies make conscious policy decisions that balance the potential harm the crime may inflict on society,²¹⁵ the seriousness of the offense, and the appropriate bur-

208. *Chrzanoski*, 327 F.3d at 193 (quoting *Tanzella*, 628 A.2d at 980).

209. *Id.* at 192.

210. *Leocal*, 125 S. Ct. at 383 (noting that 18 U.S.C. § 16 “naturally suggests a higher degree of intent than negligent or merely accidental conduct”).

211. Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. Rev. 283, 283 (1988) (stating that “[c]lassically, criminal law is thought to be predicated upon two factors, *mens rea* and *actus reus*, which literally mean ‘evil mind’ and ‘bad act’ respectively”).

212. *Supra* pt. V(B)(1) (discussing the categorical approach).

213. Dressler, *supra* n. 34, at § 10.01 (translating the Latin phrase, *actus non facit reum nisi mens sit rea*).

214. *Id.*

215. *Id.* at § 10.03 (stating that “without a culpable state of mind [one] cannot be deterred” regardless of the harm caused).

den to place on the prosecutor in proving his or her case against the alleged criminal.²¹⁶ Whereas criminal law seeks to punish individuals in accordance with the harm caused, immigration law looks to the danger of the individual in determining what constitutes a crime of violence.²¹⁷ The Supreme Court made it clear in *Leocal* that the extent of the potential or actual harm to the victim is not the measure of a deportable offense, as the alien in that case had caused serious bodily harm.²¹⁸

A. *Mens Rea* Requirements at Common Law and under the Model Penal Code: The Difficulty of Distinguishing between Negligence and Recklessness

In general, mental requirements at common law can be divided into three broad categories: specific intent, general intent, and strict liability.²¹⁹

216. *Id.* (commenting that “[t]he prosecution is constitutionally required to prove beyond a reasonable doubt every element of a criminal offense, including the defendant’s *mens rea*” and noting that “[t]his is often a difficult burden to satisfy”).

217. *Leocal*, 125 S. Ct. at 383. The Supreme Court in *Leocal* stated as follows:

Reckless disregard in § 16 relates *not* to the general conduct or to the possibility that harm will result from a person’s conduct, but to the risk that the use of physical force against another might be required in committing a crime. The classic example is burglary. A burglary would be covered under § 16(b) *not* because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.

Id. (emphasis in original); see also Mikos, *supra* n. 165, at 1448 (stating that “[t]he idea is that criminal aliens are dangerous,” and that “[w]hen the United States deports criminal aliens, this country no longer bears the costs of recidivism, and the states no longer bear the costs of investigating, prosecuting, and incarcerating repeat alien offenders”).

218. *Leocal*, 125 S. Ct. at 379, 383.

219. Batey, *supra* n. 154, at 341. The common law approach to mental requirements is the majority approach followed in both state and federal systems. *Id.* The minority approach, followed by at least twenty-four states, categorizes mental requirements in accordance with the Model Penal Code’s five mental requirements: purpose, knowledge, recklessness, negligence, and absolute, or strict, liability. See *U.S. v. Dominguez-Ochoa*, 386 F.3d 639, 646 (5th Cir. 2004) (setting forth the minority approach); Model Penal Code §§ 2.02, 2.05 (ALI 1962) (listing the five mental requirements). The Model Penal Code represents an attempt to clarify the common law categories of *mens rea*. Batey, *supra* n. 154, at 400–401. Specific intent, general intent—including negligence and recklessness—and strict liability, and their Model Penal Code counterparts, indicate the relative seriousness of the criminal culpability, with specific intent generally being regarded as the most dangerous mental state. Loewy, *supra* n. 211, at 309 (observing that “[c]rimes involving significant willfulness and premeditation seem especially amenable to deterrence”); Keiter, *supra* n. 151, at 265 (concluding that “[t]he most culpable desire state is purpose, followed by indifference or callousness”).

At common law, general intent was encompassed in the concepts of general moral blameworthiness, criminal negligence, and recklessness.²²⁰ Occasionally, courts use the concept of “knowledge” as a form of general intent as well.²²¹ The Model Penal Code condenses these ideas into two basic mental requirements: recklessness and negligence.²²² The Model Penal Code provides the following definition of recklessness:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.²²³

The Model Penal Code defines negligence as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances

Specific intent is a common law concept and is sometimes expressed in criminal statutes with the words “with the intent to” or “purpose.” Dressler, *supra* n. 34, at § 12:05. The Model Penal Code expresses a similar concept in its “purpose” and “knowledge” mental requirements. Model Penal Code § 2.02(2). It is important to note at the outset that the Model Penal Code's structure of mental requirements and the common law structure are different. Batey, *supra* n. 154, at 341–343. Under the Model Penal Code, purpose is defined as a “conscious object to engage in conduct of [a certain] nature or to cause such a result.” Model Penal Code § 2.02(2)(a)(i). Specific intent or purpose encompasses the most dangerous state of mind because a criminal acts with the conscious desire to commit a crime. *Id.*; Keiter, *supra* n. 151, at 290. For example, a defendant would act with specific intent or purpose by setting fire to a house in which he knows people are sleeping with the desire to harm those people.

220. Batey, *supra* n. 154, at 371.

221. *Id.*

222. Model Penal Code § 2.02(2)(c)–(d). The Model Penal Code disfavors negligence as a basis for criminal culpability and states that courts may not imply a mental requirement of negligence if the legislature has not expressly provided for it in the statute. *Id.* at § 2.02(3). In fact, recklessness is the minimum culpability required for every element, absent a specific provision. *Id.*

223. *Id.* at § 2.02(2)(c).

known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.²²⁴

In other words, recklessness involves consciously disregarding a serious risk, and negligence involves failing to perceive a serious risk. While the Supreme Court indicated in *Leocal* that a *mens rea* of negligence will not satisfy 18 U.S.C. § 16,²²⁵ it has proven particularly difficult for courts to distinguish between negligence and recklessness.²²⁶ Therefore, it is not feasible to define crimes of violence based on such a distinction. The Supreme Court should not force courts to employ such an unworkable distinction and should hold that 18 U.S.C. § 16 requires, at a minimum, a *mens rea* greater than recklessness.

Park v. I.N.S.,²²⁷ a case decided by the Ninth Circuit in 2001, provides an example of how the opaque distinction between negligence and recklessness impacts the analysis of crimes of violence in the immigration context. The respondent in *Park* originally came into the United States on a student visa.²²⁸ She obtained a seminary degree and became an ordained minister.²²⁹ After allegedly being involved in beating a woman to death during an exorcism ritual, the respondent pled guilty to involuntary manslaughter.²³⁰ The United States Court of Appeals for the Ninth Circuit concluded that involuntary manslaughter, defined in California Penal Code § 192(b) as the unlawful killing of a human being “in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection,” was a crime of violence.²³¹

Relying on *United States v. Ceron-Sanchez*,²³² the Ninth Circuit concluded that “a reckless [*mens rea*] is sufficient for both

224. *Id.* at § 2.02(2)(d).

225. 125 S. Ct. at 383–384.

226. Batey, *supra* n. 154, at 366–380 (discussing several cases applying a standard close to recklessness where negligence was required).

227. 252 F.3d 1018 (9th Cir. 2003).

228. *Id.* at 1020.

229. *Id.*

230. *Id.*

231. *Park*, 252 F.3d at 1022, 1025.

232. 222 F.3d 1169, 1172–1173 (9th Cir. 2000) (holding that aggravated assault with a deadly weapon or deadly instrument is a crime of violence).

§ 16(a) and § 16(b).”²³³ In so concluding, the Ninth Circuit rejected the respondent’s contention that a crime of violence under 18 U.S.C. § 16(b) requires the “substantial risk that physical force” would be used intentionally in the commission of the offense.²³⁴ Next, the Ninth Circuit relied on the California Supreme Court’s interpretation of § 192(b) in *People v. Penny*.²³⁵ In *Penny*, the California Supreme Court, after concluding that the words “without due caution and circumspection” in § 192(b) indicated a *mens rea* of criminal negligence, interpreted criminal negligence in the context of manslaughter, stating that it “must appear that the death was not the result of misadventure, but the natural and probable result of a reckless or culpably negligent act.”²³⁶ Based on *Penny*, the Ninth Circuit concluded that “[i]nvoluntary manslaughter under California law may be committed with only criminal negligence.”²³⁷

Then, the Ninth Circuit equated the definition of criminal negligence in *Penny*, which had not been held to be sufficient to satisfy 18 U.S.C. § 16, with the definition of recklessness described in *Ceron-Sanchez*, which was sufficient to satisfy 18 U.S.C. § 16, and concluded as follows:

Given the substantial similarity of recklessness in Arizona and criminal negligence in the involuntary manslaughter context in California, our holding that involuntary manslaughter under California law is a “crime of violence” under § 16(b) conforms with our decision in *Ceron-Sanchez*.²³⁸

Essentially, the Ninth Circuit refused to distinguish between the *mens rea* requirements of negligence and recklessness due to the “substantial similarity” between the definitions in reaching its holding that the crime of involuntary manslaughter was a crime of violence.²³⁹ Subsequent to its decision in *Park*, the Ninth Cir-

233. *Park*, 252 F.3d at 1024.

234. *Id.* at 1023–1024.

235. 285 P.2d 926, 937 (Cal. 1955).

236. *Id.*

237. *Park*, 252 F.3d at 1024.

238. *Id.* at 1024–1025.

239. *Id.*

cuit has continued to hold that a *mens rea* of recklessness is minimally sufficient to satisfy 18 U.S.C. § 16.²⁴⁰

As illustrated by *Park*, one reason immigration courts struggle in defining crimes of violence is that the judicial interpretations of the state statutes forming the basis for an alien's conviction are not clear.²⁴¹ If the Supreme Court limits crimes of violence to crimes with a greater *mens rea* than recklessness, it will provide more consistent results and will mitigate the impact of

240. *U.S. v. Hernandez-Castellanos*, 287 F.3d 876, 881 (9th Cir. 2002) (holding that reckless endangerment, although satisfying the *mens rea* requirement of 18 U.S.C. § 16(b), does not require the risk that physical force be used and reasoning that “[f]or a crime based on recklessness to be a crime of violence under § 16(b), the crime must require recklessness as to, or conscious disregard of, a risk that physical force will be used against another, not merely the risk that another might be injured”); *U.S. v. Campos-Fuerte*, 357 F.3d 956, 961 (9th Cir. 2004) (superseded by statute) (holding that flight from a police officer in willful and wanton disregard for safety, in violation of California Vehicle Code § 2800.2, is a crime of violence and concluding that “[w]illful or wanton misconduct is at least the equivalent of recklessness”). Further, the BIA continues to rely on the Ninth Circuit's incorrect interpretation of the similarity between recklessness and negligence in *Park* as its rationale for holding that recklessness, and even gross negligence, can form the basis for a crime of violence and to limit the holding in *Leocal* to negligence. See *In re Fiore-Gonzalez*, 2005 WL 1104183 (BIA Mar. 18, 2005) (unpublished); *Marin-Garcia*, 2005 WL 698293 (BIA Feb. 25, 2005) (unpublished). In *Marin-Garcia*, the BIA determined that the offense of gross vehicular manslaughter while intoxicated, with a *mens rea* of gross negligence, is a crime of violence. *Id.* The BIA reasoned that the California Supreme Court had previously “stated that gross negligence is ‘the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences.’” *Id.* The BIA concluded,

This “conscious indifference to the consequences” parallels the “conscious disregard to risk of harm” that the United States Court of Appeals for the Ninth Circuit found sufficient to constitute recklessness. In *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001), the Ninth Circuit found that involuntary manslaughter, a crime only requiring criminal negligence, was a crime of violence. The court cited *People v. Penny*, 285 P.2d 926, 937 (Cal. 1955), which found that crimes of criminal negligence include crimes in which the negligence is “aggravated, culpable, gross, or reckless.” The *Penny* Court further stated that criminal negligence includes “a disregard of human life or an indifference to consequences.” . . . Based on the foregoing, it appears that “gross negligence” under California criminal law requires a volitional act. Thus, gross vehicular manslaughter while intoxicated is a crime of violence.

Id. The Ninth Circuit has rejected this conclusion. See *Lara-Cazares*, 408 F.3d at 1219 (holding that driving while intoxicated with gross negligence is not a crime of violence).

241. See *Linehan v. State*, 442 So. 2d 244, 248 (Fla. 2d Dist. App. 1983) (stating that “[c]andor compels the conclusion that whatever particular tests or distinctions are devised relative to ‘specific’ and ‘general’ intent, a perception of which type of intent the legislature meant in a particular statute is by no means always easy”); *Penny*, 285 P.2d at 937 (stating that “negligence must be aggravated, culpable, gross, or reckless” (citing 26 Am. Jur. *Homicide* § 210)).

the *mens rea* ambiguities in criminal law on the deportation of lawful permanent residents.

B. *Mens Rea* and Crimes of Violence:
Recklessness as a Basis for Deportation

By determining that a *mens rea* of recklessness does not satisfy the statutory definition of a crime of violence,²⁴² the Supreme Court would accomplish two important goals. First, from a policy perspective, it would ensure that the crimes of violence that form a basis for deportation involve only the most dangerous type of intentional conduct. While many dangerous crimes involve recklessness, these crimes could be specifically designated as aggravated felonies in the INA so that they would continue to be deportable offenses. For example, murder, rape, and sexual abuse of a minor are all aggravated felonies²⁴³ and do not need to be classified as crimes of violence to be deportable offenses. The crime of violence definition need not encompass every dangerous offense, as Congress can specifically categorize particularly dangerous offenses in the statute as deportable offenses. Second, the Supreme Court would eliminate the inconsistencies among the interpretations of 18 U.S.C. § 16 by expressly rejecting the idea that the *mens rea* of recklessness is sufficient to form the basis for a crime of violence.

The inquiry under 18 U.S.C. § 16 is not about criminal culpability. It is about where Congress and the courts should draw the line that distinguishes between deportable and non-deportable offenses.²⁴⁴ Congress has plenary power over the regulation of immigration,²⁴⁵ and the courts have the power to interpret, pursuant to 18 U.S.C. § 16, which offenses are so dangerous to the

242. See *infra* nn. 287–290 and accompanying text (stating what the interpretation of a crime of violence would entail).

243. 8 U.S.C. § 1101(a)(43)(A).

244. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (commenting that an immigration judge's "sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country").

245. *Fiallo v. Bell*, 430 U.S. 787, 795 n. 6, 795–798 (1977) (deferring to Congress's plenary and exclusive power to regulate immigration); *Chae Chan Ping v. U.S.*, 130 U.S. 581, 603 (1889) (stating that Congress may exclude any alien from entering the country); *Bronsztejn v. I.N.S.*, 526 F.2d 1290, 1291 (2d Cir. 1975) (recognizing that Congress has plenary and exclusive power to regulate immigration).

structure of American society that they require deportation as the only remedy.²⁴⁶ When attempting to draw this line, it is important to remember the drastic impact that deportation has on immigrant families and the economy of the United States.²⁴⁷ Many who are deported under these provisions are lawful permanent residents who are working, paying taxes, and building lives in America.²⁴⁸ As the Supreme Court has recognized, deportation is, in effect, a form of punishment with retributive policy foundations.²⁴⁹ Given these consequences and policies, it is imperative that the Supreme Court narrowly tailor deportation based on crimes of violence to encompass only the most dangerous and severe crimes.

Also providing support for a narrowly tailored and clear definition of deportable offenses are the constitutional and foreign policy implications of crime-related deportation. Scholars have suggested that the lack of uniformity in the definition of crimes of

246. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1890, 1892 (2000) (stating that American deportation policy has “aimed increasingly at permanently ‘cleansing’ our society of those with undesirable qualities, especially criminal behavior”).

247. Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 Geo. Immig. L.J. 115, 116 (1999) (stating that courts should “discard the legal fiction that deportation is no more than a civil proceeding which does not amount to punishment”); Beth J. Werlin, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. Third World L.J. 393, 405 (2000) (stating that “[s]cholars and courts have recognized the gravity of deportation, and likened it to criminal punishment”).

248. See Pinzon, *supra* n. 37, at 29 (discussing the deportation proceedings of a lawful immigrant).

249. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). In *Bridges*, the Supreme Court noted as follows:

Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Id. For more on deportation as punishment, see Justice Douglas and Justice Black’s discussion in *Harisiades v. Shaughnessey*, explaining as follows:

[Banishment can] deprive a man and his family of all that makes life worthwhile. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.

342 U.S. 580, 600 (1952).

violence is unconstitutional²⁵⁰ and that the lack of judicial discretion in crime-related deportation proceedings violates principles of equal protection.²⁵¹ In addition, some authors argue that the United States' current crime-related deportation violates the United States' international legal obligations under the United Nations Convention Relating to the Status of Refugees²⁵² because it denies protection to qualifying asylees.²⁵³ Requiring that crimes of violence have a greater *mens rea* requirement than recklessness will provide a narrow definition that responds to each of these concerns.²⁵⁴

C. An Example of the Proposed *Mens Rea* Requirement for Crimes of Violence

*In re Palacios*²⁵⁵ provides a useful example of what judicial analysis would look like under an interpretation of the crime of violence provision requiring a *mens rea* greater than recklessness. *Palacios* involved a lawful permanent resident who was admitted

250. *E.g.* Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. Rev. 1696, 1732 (1999) (arguing that the Model Penal Code would provide a standardized mechanism for crime-related deportation).

251. *E.g.* Valerie Neal, *Slings and Arrows of Outrageous Fortune: The Deportation of "Aggravated Felons"*, 36 Vand. J. Transnatl. L. 1619, 1633–1636, 1666 (2003) (evaluating equal protection claims based on the denial of § 212(c) waiver relief and the § 212(h) waiver).

252. *United Nations Convention Relating to the Status of Refugees* (Apr. 22, 1954), 189 U.N.T.S. 150.

253. Gwendolyn Holinka, Student Author, *Q-T-M-T: The Denial of Humanitarian Relief for Aggravated Felons*, 13 Emory Intl. L. Rev. 405, 415 (1999) (noting that in precluding asylum for those convicted of a "particularly serious crime," and in broadly construing that phrase to include aggravated felonies, "the United States has twisted [the particularly serious crime] exception beyond the scope of its intent and is failing to meet its international obligations"); *see also* Cook, *supra* n. 16, at 293 (arguing that the aggravated felony provision of the INA, as well as the failure to grant discretionary relief from removal to aggravated felons, violates "an individual's universally recognized right to respect for family and private life").

254. It is common practice at common law for courts to imply a mental requirement to a statute where the legislature has failed to include one. *Batey*, *supra* n. 154, at 342. However, there is no mechanism for determining how a court may do so. *Id.* While some crimes are strict liability crimes and do not have a *mens rea* requirement, these crimes are typically violations of regulations such as traffic laws, food and drug laws, and pollution laws. *Id.* at 361–366. Another important aspect of strict liability crimes is that the form of punishment is generally restricted to the payment of a fine. *Id.*

255. 22 I. & N. Dec. 434 (BIA 1998).

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to the United States on or about April 24, 1990.²⁵⁶ On July 19, 1995, the alien was convicted of arson in violation of § 11.46.400 of the Alaska Statutes.²⁵⁷ The statute provides that:

- (a) A person commits the crime of arson in the first degree if the person intentionally damages any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury. . . .
- (b) Arson in the first degree is a class A felony.²⁵⁸

The immigration judge found that the alien was deportable as an aggravated felon for having committed a crime of violence.²⁵⁹ On appeal to the BIA, the alien argued that arson was not a crime of violence under 18 U.S.C. § 16(b).²⁶⁰ The BIA relied on the test established in *In re Alcantar*,²⁶¹ stating that a crime of violence is an offense “such that its commission ordinarily would present a risk that physical force would be used against the person or property of another.”²⁶² Following, without explanation, the reasoning in *Alcantar* that recklessness can form the basis for a crime of violence,²⁶³ the BIA did not analyze whether recklessness could form such a basis.²⁶⁴ The BIA concluded that “the intentional starting of a fire or causing an explosion ordinarily would lead to the substantial risk of damaging property of another”²⁶⁵ and held that arson was a crime of violence.²⁶⁶

In response to the majority opinion, Judge Lory Diana Rosenberg²⁶⁷ wrote an extensive dissent in which she stated that

256. *Id.* at 434.

257. *Id.*

258. Alaska Stat. § 11.46.400 (1994).

259. *Palacios*, 22 I. & N. Dec. at 435.

260. *Id.*

261. 20 I. & N. Dec. 801, 812 (BIA 1994).

262. *Palacios*, 22 I. & N. Dec. at 436 (quoting *Alcantar*, 20 I. & N. Dec. at 812).

263. *See infra* nn. 295–297 and accompanying text (discussing the reasoning in *Alcantar*).

264. *Palacios*, 22 I. & N. Dec. at 437.

265. *Id.*

266. *Id.*

267. Judge Rosenberg’s view of immigration law, and in particular the legal definition of “crime of violence” under the INA, has become quite apparent in her recent poem, *Crimes of Violence 2004*, which follows the musical cadence of Simon and Garfunkel’s “The Sounds of Silence”:

arson, as defined in the Alaska statute, was not a crime of violence, even though it “might sound as though it would be an aggravated felony.”²⁶⁸ Judge Rosenberg proposed, in place of the majority’s test, a three-step analytical approach to be used in determining whether state statutes constitute crimes of violence under 18 U.S.C. § 16.²⁶⁹ Adopting the reasoning of *United States v. Taylor*,²⁷⁰ Judge Rosenberg stated that the first step in determining whether an offense constituted a crime of violence was to ap-

Hello, darkness my old friend
 The law has retrogressed again
 Doesn't matter when the crime occurred
 Aggravated felony will be inferred
 And enforcement over liberty will reign
 Especially, with a crime of violence

They picked my friend up last July
 Probation said she should come by
 Jailed a mom who never would use force
 Someone told her she should plead, of course
 Now I heard that a DUI without mens rea
 Down Florida way
 Just might be, a crime of violence
 And after researching I saw
 The overbreadth that taints this law
 Covers almost every type offense
 I ask you, how can that make any sense?
 Not just elements, but probabilities
 Especially, with a crime of violence

“Fools!” said I, “she didn’t know
 Removal seems ex post facto
 Back in ’95 she had a few
 Called her ex and made a threat or two
 But she swore that she’d never touch a hair. . .
 “Though no one cared,
 They believed, it was a crime of violence

Because Congress bowed and prayed,
 And by hysteria was swayed.
 So the law deports without regard
 To whether separation makes life hard,
 And the law means removal from your family in the States.
 Yes, that’s your fate
 Especially, for a crime of violence.

Lory D. Rosenberg, *Crimes of Violence 2004* (available at <http://www.ilw.com/lawyers/articles/2004,0421-Rosenberg.shtm>) (accessed June 22, 2005).

268. *Palacios*, 22 I. & N. Dec. at 438 (Rosenberg, J., dissenting).

269. *Id.* at 445–446.

270. 495 U.S. 575 (1990). In this case, the Supreme Court adopted a federal definition for burglary, which now provides the basis for deportation as an aggravated felon under INA § 101(43)(G). *Id.* at 590.

ply a “federal definition of arson that recognizes the generic or categorical elements of the crime.”²⁷¹ Next, Judge Rosenberg would evaluate whether the federal definition of arson constitutes a crime of violence under 18 U.S.C. § 16.²⁷² The Judge agreed with the Third Circuit’s observation that 18 U.S.C. § 16(b) “suggests a willingness to risk having to commit a crime of specific intent.”²⁷³ In effect, Judge Rosenberg suggested that a *mens rea* of recklessness should never be sufficient to constitute a crime of violence under 18 U.S.C. § 16(a) or (b), which require the specific intent to use physical force.²⁷⁴

Finally, Judge Rosenberg evaluated the Alaska arson statute in relation to the federal definition of arson.²⁷⁵ Judge Rosenberg noted that the “federal definition of ‘arson’ is narrower in certain respects than the Alaska ‘arson’ statute” primarily because the federal arson statute requires an intent to damage the property of another, while the Alaska statute merely requires the “intent to damage property,” which can include one’s own property.²⁷⁶ The Judge concluded that this difference between the Alaska statute and the federal definition indicates that arson under the Alaska statute is not a crime of violence under 18 U.S.C. § 16(a).²⁷⁷

The majority’s approach in *Palacios* is inconsistent with the Supreme Court’s ruling in *Leocal*, in which the Supreme Court specifically indicated that crimes of violence must involve a minimum *mens rea* requirement,²⁷⁸ because the BIA in *Palacios* did not discuss the mental requirement of the Alaska arson statute.²⁷⁹

271. *Palacios*, 22 I. & N. Dec. at 445 (Rosenberg, J., dissenting).

272. *Id.*

273. *Id.* at 451 (quoting *Parson*, 955 F.2d at 866).

274. *Id.*

275. *Id.* at 455–456.

276. *Id.* at 456.

277. *Id.*

278. *Leocal*, 125 S. Ct. at 382.

279. *Palacios*, 22 I. & N. Dec. at 437; see also *Tran*, 414 F.3d at 472. In *Tran*, the Third Circuit recognized, in holding that the crime of “reckless burning or exploding” was not a crime of violence, the circuit split with respect to the *mens rea* of recklessness as forming the basis for a crime of violence and stated that several decisions have been abrogated by *Leocal*:

Three other Courts of Appeals have followed the approach of *Parson* [in requiring specific intent under 18 U.S.C. § 16], which we reaffirm today. See *Jobson v. Ashcroft*, 326 F.3d 367, 372–373 (2d Cir. 2003); *U.S. v. Chapa-Garza*, 243 F.3d 921, 925–927 (5th Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 610–611 (7th Cir. 2001). Four others have not required specific intent to qualify as a § 16(b) crime of violence.

The dissent's approach, while correct in its interpretation of the mental requirement, is cumbersome and difficult to implement. Interpreting 18 U.S.C. § 16 to include a requirement that crimes of violence have a mental requirement greater than recklessness would avoid both problems.

As applied to Alaska's arson statute, such a requirement would indicate that arson defines an offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."²⁸⁰ The starting of a fire satisfies the "physical force" element.²⁸¹ In terms of the mental requirement, criminal culpability under the Alaska statute arises when a person has the "purpose" to damage property by starting a fire.²⁸² With respect to "recklessness," the statute requires that the criminal be reckless with regard to injury to another.²⁸³ However, the *mens rea* of recklessness in the arson statute does not relate to the starting of the fire, the physical force element. Rather, the "purpose" mental requirement relates to the physical force element. Thus, the arson statute requires that the criminal engage in conduct that presents the substantial risk that intentional physical force, the starting of a fire, may be used against the person or property of another. It requires a *mens rea* greater than recklessness and may, therefore, be categorized as a crime of violence by meeting the other elements of 18 U.S.C. § 16.²⁸⁴

See Omar v. INS, 298 F.3d 710, 715–716 (8th Cir. 2002); [*Park v. INS*, 252 F.3d 1018, 1023–1024 (9th Cir. 2001)]; *Tapia Garcia v. INS*, 237 F.3d 1216, 1222 (10th Cir. 2001); *Le v. U.S. Atty. Gen.*, 196 F.3d 1352, 1354 (11th Cir. 1999). The approaches of the Eighth, Tenth, and Eleventh Circuits did not require even a reckless *mens rea* to meet the § 16(b) standard, and thus have been abrogated, at least to that extent, by *Leocal*.

414 F.3d at 472.

280. Alaska Stat. § 11.46.400 (1994); 18 U.S.C. § 16(b).

281. *See Palacios*, 22 I. & N. Dec. at 452 (reasoning that "maliciously striking a match to burn my law degree after placing it in my fully paid-for hibachi grill, arguably may involve physical force as an element of the offense, but if it is not directed at the property of another, it would not qualify as a crime of violence under 18 U.S.C. § 16").

282. Alaska Stat. § 11.81.900 (stating that the word "intentional" in the statute means purposeful conduct).

283. *Id.*

284. *See Tran*, 414 F.3d at 473. In *Tran*, the Third Circuit rejected *Palacios* as controlling in determining whether the crime of reckless burning was a crime of violence. *Id.* The court noted that in *Palacios*, "the BIA did not conduct the inquiry, mandated by *Parson* and *Leocal*, into whether the Alaska arson statute necessarily involved a substantial risk

The Supreme Court should interpret 18 U.S.C. § 16 to require that crimes of violence include offenses that meet the definition of 18 U.S.C. § 16 only when the “physical force” element of the statute incorporates a *mens rea* requirement that is greater than recklessness. Thus, an immigration judge would interpret 18 U.S.C. § 16(b) to include an offense that is a felony and that, by its nature, involves a substantial risk that *intentional* physical force against the person or property of another may be used in the course of committing the offense, when the “intent” is higher than recklessness.²⁸⁵ Pursuant to this definition, the Alaska arson statute would describe a crime of violence, and reaching this conclusion would involve neither a deviation from the Supreme Court’s reasoning in *Leocal* nor a time-consuming, complex, strained, three-step analysis involving the application of federal definitions of state crimes.²⁸⁶ It would merely require an immigration judge to look to the state statute and determine whether the statute required something more than recklessness with respect to the physical force element of the statute.

VII. INVOLUNTARY MANSLAUGHTER, RECKLESSNESS,
AND 18 U.S.C. § 16

Any interpretation of the INA’s crime-related deportation structure must balance the policy goals of Congress and the INS of using crime-related deportation as a mechanism for protecting American society from terrorists and other kinds of severe threats, against the interests of lawful permanent residents who have committed minor crimes and present little danger to American society.²⁸⁷ In this respect, the proposed interpretation would restrict the types of offenses that would be considered crimes of violence but would allow Congress to specifically designate other

of *using force*.” *Id.* (emphasis in original). The court further stated that “the analysis of *Palacios-Pinera* must now be considered to have been in error.” *Id.*

285. See *Tran*, 414 F.3d at 472–473 (stating that “following *Parson* and *Leocal*, . . . a crime of violence under § 16(b) must involve a substantial risk that the actor will intentionally use physical force in committing his crime” and determining that recklessness does not satisfy this “intent”).

286. See *supra* nn. 278–280 and accompanying text (discussing the problems with the majority and dissent in *Palacios*).

287. *Supra* pt. III (discussing the relationship between crime-related deportation and national security).

violent crimes as deportable offenses. To accomplish this result, the Supreme Court should find that 18 U.S.C. § 16 does not contemplate offenses with *mens rea* requirements of recklessness²⁸⁸ and should hold that involuntary manslaughter is not a crime of violence.²⁸⁹ Interpreting 18 U.S.C. § 16 to require that crimes of violence have a *mens rea* greater than recklessness would take the Supreme Court's decision in *Leocal* one step further and would also possibly exclude from the category of crimes of violence offenses such as criminal contempt, unauthorized use of a motor vehicle, and criminal trespass when they are committed with recklessness or negligence.

While the BIA held in 1994 that involuntary manslaughter is a crime of violence,²⁹⁰ courts addressing the issue more recently have rejected this conclusion.²⁹¹ Because the BIA's 1994 decision in *Alcantar* pre-dated both the drastic changes to immigration law in 1996 and the Supreme Court's decision in *Leocal*, it should not be considered controlling.²⁹²

In *Alcantar*, the BIA relied on provisions related to 18 U.S.C. § 16 to analyze the type of *mens rea* requirement contemplated by the crime of violence definition,²⁹³ stating that "our analysis of the term 'crime of violence' is preceded by a history of interpretation of the same term for other purposes in the United States Code."²⁹⁴ Specifically, *Alcantar* relied on the legislative history behind the crime of violence definition in 18 U.S.C. § 924(c)(3) as discussed in *United States v. Springfield*,²⁹⁵ when the Ninth Circuit stated

288. *E.g. Jobson*, 326 F.3d at 372, 376 (holding that involuntary manslaughter, with a *mens rea* of recklessness, is not a crime of violence); *U.S. v. Dominguez-Hernandez*, 98 Fed. Appx. 331, 334 (5th Cir. 2004) (holding that involuntary manslaughter in violation of Texas Penal Code § 19.04(a)(1) (2003), which requires the prosecution to prove that the defendant "recklessly cause[d] the death of an individual," was not a crime of violence under 18 U.S.C. § 16 because it "does not require that the government establish the use of intentional physical force to obtain a conviction").

289. *See supra* nn. 44–48 (discussing how the circuit split regarding manslaughter is due to the court's interpretations of a *mens rea* of recklessness).

290. *Alcantar*, 20 I. & N. Dec. at 813–814.

291. *E.g. Jobson*, 326 F.3d at 376; *Dominguez-Hernandez*, 98 Fed. Appx. at 334; *Oye-banji*, 414 F.3d at 263.

292. As stated earlier, the BIA has continued to rely on its reasoning in *Alcantar* even after *Leocal*. *Supra* nn. 45, 240 and accompanying text. Other courts have rejected this approach. *E.g. Tran*, 414 F.3d at 472.

293. *Alcantar*, 20 I. & N. Dec. at 803–804.

294. *Id.* at 807.

295. 829 F.2d 860, 863 (9th Cir. 1987).

that Congress had not intended for § 924(c)(3) to encompass crimes with a *mens rea* of recklessness.²⁹⁶ The BIA's reliance on *Springfield* and the legislative history of § 924(c)(3) was misplaced.²⁹⁷ The legislative history of 18 U.S.C. § 16 indicates that Congress did not intend for 18 U.S.C. § 16 to apply to involuntary manslaughter because the District of Columbia statute on which 18 U.S.C. § 16 is based lists voluntary manslaughter, not involuntary manslaughter, as a crime of violence.²⁹⁸ Furthermore, due to the absence of any explicit guidance, much of the BIA's reasoning in *Alcantar* was based on the statutory construction of language similar to 18 U.S.C. § 16;²⁹⁹ however, the Supreme Court has now provided explicit guidance with respect to 18 U.S.C. § 16 in *Leocal*. For these reasons, the BIA's decision in *Alcantar* should not preclude a determination that involuntary manslaughter is not a crime of violence.

Not all courts have continued to follow *Alcantar*.³⁰⁰ In *Jobson v. Ashcroft*,³⁰¹ the United States Court of Appeals for the Second Circuit held that second degree manslaughter was not a crime of violence under 18 U.S.C. § 16(b).³⁰² Preceding the Second Circuit's review of *Jobson*, both an immigration judge and the BIA had concluded that the respondent's conviction for manslaughter in the second-degree was a crime of violence.³⁰³ The respondent was a lawful permanent resident and had resided in the United States since he was eight years old.³⁰⁴ He pled guilty to second-degree manslaughter for "recklessly causing the death of his infant son."³⁰⁵ The New York statute under which the respondent was convicted defined second-degree manslaughter as "recklessly caus[ing] the death of another person."³⁰⁶ In finding that the re-

296. *Id.*

297. Indeed, at least one court has refused to extend the reasoning in *Leocal* based on 18 U.S.C. § 16 to § 924(e). *E.g. U.S. v. Hudson*, 414 F.3d 931, 935 (8th Cir. 2005).

298. *Supra* n. 67 (discussing how § 23-1331 (2001) of the Code for the District of Columbia provided the basis for 18 U.S.C. § 16 and quoting § 23-1331, which defines crime of violence as "*voluntary manslaughter*" (emphasis added)).

299. *Alcantar*, 20 I. & N Dec. at 803–806.

300. *E.g. Jobson*, 326 F.3d at 376.

301. 326 F.3d 367 (2d Cir. 2003).

302. *Id.*

303. *Id.* at 369.

304. *Id.*

305. *Id.* at 370.

306. *Id.* (quoting N.Y. Penal Law § 125.15(1) (McKinney 2003)).

spondent's conviction did not constitute a crime of violence, the Second Circuit noted that the immigration judge defined 18 U.S.C. § 16(b) as encompassing behavior that is both negligent and reckless.³⁰⁷ New York statutes adopted a definition of recklessness similar to the language in the Model Penal Code definition.³⁰⁸ The court cited *Dalton v. Ashcroft*³⁰⁹ for the proposition that "the verb 'use' in [§] 16(b) . . . suggests that [§] 16(b) 'contemplates only *intentional* conduct . . . [and] a substantial likelihood that the perpetrator will *intentionally* employ physical force."³¹⁰ The Second Circuit then reasoned that "an unintentional accident caused by recklessness cannot properly be said to involve a substantial risk that a defendant will use physical force."³¹¹ The Second Circuit held that second-degree manslaughter, with a *mens rea* of recklessness, was not a crime of violence.³¹²

The Supreme Court should use *Jobson* as a guide and extend its holding in *Leocal* to find that recklessness reflects "merely accidental conduct"³¹³ and that involuntary manslaughter is not a crime of violence because it does not involve "intentional" physical force.

VIII. CONCLUSION

This Comment has attempted to increase awareness regarding how and why minor crimes have become deportable offenses,

307. *Id.* at 370–371.

308. *Id.* at 372 (stating that "[a]ccording to [New York Penal Law] § 15.05(3), '[a] person acts recklessly with respect to a result or to a circumstance . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists'").

309. 257 F.3d 200, 206 (2d Cir. 2001) (pointing out that "[a]lthough an accident may properly be said to involve force, one cannot be said to *use* force in an accident as one might use force to pry open a heavy, jammed door" (emphasis in original)).

310. *Jobson*, 326 F.3d at 373 (emphasis in original).

311. *Id.*

312. *Id.* It should be noted that the court's final conclusion was based on the distinction between risk of injury and risk of physical force. *Id.* The court finally concluded that "the offense requires only recklessness—conscious disregard—with respect to a substantial risk of death, but not with respect to a substantial risk of use of force." *Id.* at 374. Thus, according to the Second Circuit, "a defendant must be reckless not just about potential injury, but also about having to *intentionally* use force during the commission of a crime." *Id.* at 375 (emphasis in original).

313. See *Leocal*, 125 S. Ct. at 382 (stating that 18 U.S.C. § 16 "suggests a higher degree of intent than negligent or merely accidental conduct"); *Oyebanji*, 418 F.3d at 263 (same).

and it has striven to suggest one way of confronting this situation in the context of crimes of violence. In *Leocal*, the Supreme Court expressed support for the idea that crimes of violence must involve a minimum mental requirement. In effect, the Court has taken a step toward limiting the scope of 18 U.S.C. § 16. Over the next several years, DHS will likely continue to litigate the issue of which offenses constitute crimes of violence. In contemplation of such litigation, this Comment presented an argument that aliens and their attorneys could make if the offense in question involves a *mens rea* of recklessness. These aliens should argue that the minimum mental requirement contemplated by 18 U.S.C. § 16 is not negligence, as the Court held in *Leocal*, but recklessness, based on the Court's statement that 18 U.S.C. § 16 "suggests a higher degree of intent than negligence or merely accidental conduct."³¹⁴

When attempting to further define crimes of violence through litigation, DHS, immigration judges, and attorneys representing aliens should be aware of the complex interplay between criminal law and immigration law, especially in the context of 18 U.S.C. § 16, which fails to account for the complexity and importance of mental requirements within criminal law. The Court's recent recognition of an implied mental requirement in 18 U.S.C. § 16 is only the first step in reconciling the conflict between the two areas of law. Now courts must determine, as a matter of policy, whether a person who creates the substantial risk that physical force will be used recklessly presents such a serious danger that he or she should be deported. Regardless of whether the Court finds that a *mens rea* of recklessness is sufficient for deportation, legislators, judges, and practitioners should be aware of the different goals of criminal law and immigration law and should consider these during deportation proceedings.

The main limitation of the proposed interpretation of crimes of violence is, of course, that it would not affect crime-related deportation based on the other categories of aggravated felonies, nor would it restrict crime-related deportation based on crimes involving moral turpitude. It is only one very narrow solution to a broad problem. However, broad legislative amendments, such as the

314. *Leocal*, 125 S. Ct. at 382.

Restoration of Fairness in Immigration Act, have not been readily accepted,³¹⁵ and crime-related deportation must change one provision at a time, keeping in mind the fact that Congress appears to view deportation based on minor crimes, one of the main complaints of those who wish to reform immigration law, as supporting the national security goals related to terrorism.³¹⁶

315. *Supra* n. 132 and accompanying text (stating that Representative Conyers' bill has not yet become law).

316. *Supra* pt. III (discussing the relationship between crime-related deportation and national security).